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No.

In the

Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Subject to certain limited exceptions, Section 1604 of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. 1602 *et seq.*, recognizes that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." In holding that Section 1605(a)(3)'s "expropriation exception," which provides that "[a] foreign state shall not be immune from the jurisdiction * * * in any case * * * in which rights in property taken in violation of international law are in issue," stripped petitioners the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation of their sovereign immunity in this case, the en banc Ninth Circuit incorrectly decided two exceptionally important legal questions in direct contravention of the long-standing public position of the United States Department of State, customary international law, and United States common law:

1. Whether the FSIA "expropriation exception" permits United States courts to strip a foreign sovereign of its presumptive sovereign immunity simply because it owns property allegedly taken in violation of international law by another nation?

2. Whether a plaintiff relying on the FSIA's expropriation exception must exhaust available remedies in the relevant country before invoking the jurisdiction of United States courts?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties appear in the caption of the case on the cover page.

Petitioner Kingdom of Spain ("Spain") is a foreign sovereign. Petitioner Thyssen-Bornemisza Collection Foundation (the "Foundation") owns, manages, and maintains the Thyssen-Bornemisza Museum in Madrid, Spain. The Foundation is a not-for-profit entity established for educational and cultural purposes; it is a separate legal entity, created under the laws of Spain.

Respondent Claude Cassirer, the original plaintiff in this action, was a United States citizen who resided in San Diego, California. He died on September 25, 2010, while this action was pending before the United States Court of Appeals for the Ninth Circuit. On October 22, 2010, the parties, in response to an order from the Ninth Circuit, filed a Joint Stipulation regarding Mr. Cassirer's death. In the Stipulation, the parties agreed to substitute the Estate of Claude Cassirer as the plaintiff in this action. Counsel for petitioners has been informed by respondent's counsel that he expects Beverly Cassirer, Claude Cassirer's widow, to be appointed Personal Representative of Claude Cassirer's estate on or about December 14, 2010.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS AND ORDERS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit appears in the Appendix, App. 1a to 54a and is reported at 616 F.3d 1019 (9th Cir. 2010).

The three-judge opinion of the United States Court of Appeals for the Ninth Circuit appears in the Appendix, App. 55a to 99a and is reported at 580 F.3d 1048 (9th Cir. 2009).

The memorandum and order of the United States District Court for the Central District of California appears in the Appendix, App. 100a to140a and is reported at 461 F. Supp. 2d 1157 (C.D. Cal. 2006).

BASIS FOR JURISDICTION

The en banc order of the United States Court of Appeals for the Ninth Circuit was entered on August 12, 2010. This petition for certiorari was filed within 120 days from that date, in accordance with the Application for an Extension granted by Justice Kennedy. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Foreign Sovereign Immunity Act ("FSIA"), are reproduced at App. 141a to145a: 28 U.S.C. 1602; 1603; 1604; 1605(a).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. 1330(a) on the ground that Spain and the Foundation are "foreign states" as defined in 28 U.S.C. 1603(a), but that neither is entitled to the presumptive immunity afforded by the FSIA or any other applicable international agreement.

The FSIA

The FSIA is the only means of exercising jurisdiction over a foreign sovereign in the United States. It was enacted in 1976 "to address 'the potential sensitivity of actions against foreign states.' [It] aimed 'to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.'" *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (quoting H. R. Rep. No. 1487, at 45 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631, 6634). The FSIA clarifies that the restrictive theory (rather than the former absolute theory) of sovereign immunity applies to all suits brought against foreign nations in United States courts.

The FSIA underscores that foreign sovereigns are presumptively immune from United States jurisdiction, absent a limited number of explicit exceptions. *See, e.g.*, 28 U.S.C. 1604 (stating that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this chapter"). The FSIA's expropriation exception to sovereign immunity provides that "[a] foreign state shall not be immune from the jurisdiction of the courts

of the United States or of the States in a case * * * in which rights in property taken in violation of international law are in issue * * *." 28 U.S.C. 1605(a)(3).[1]

The Decisions Below

Respondent filed his complaint on May 10, 2005. In 2006, the petitioners filed motions to dismiss the complaint, asserting a number of defenses, including sovereign immunity. The district court denied the motions, finding (1) that Section 1605(a)(3) applies to foreign states and their instrumentalities, even if the foreign state had acquired the disputed property through legitimate channels and had not itself committed any violation of international law; and (2) that the FSIA does not require a plaintiff to exhaust available foreign remedies before invoking the jurisdiction of the United States courts. App. 107a-133a.

On interlocutory appeal to the Ninth Circuit pursuant to the collateral order doctrine, a three-judge panel held that the plain language of Section 1605(a)(3) is not ambiguous and does not require that a foreign state against whom the claim is made be the entity alleged to have taken the property in violation of international law. App. 67a-68a. Citing Justice Breyer's concurrence in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the majority predicted

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[1] The expropriation exception can apply to foreign states and to an "agency or instrumentality of the foreign state." 28 U.S.C. 1605(a)(3). Petitioner Foundation states, and respondent agrees, that for this analysis of jurisdiction under the FSIA, it is an "agency or instrumentality" of Spain.

that members of this Court might well read Section 1605(a)(3) to require exhaustion. App. 81a (citing *Altmann*, 541 U.S. at 714 (Breyer, J., concurring) ("[A] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking * * *. A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the expropriating state may have trouble showing a tak[ing] in violation of international law.") (internal quotation marks omitted).

The majority held, however, that "[a]bsent clear Congressional intent, we cannot incorporate exhaustion as an absolute requirement." App. 80a. The majority looked to its prior decision in *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc) (plurality opinion), where an en banc panel held that domestic prudential standards and core principles of international law require a district court to consider exhaustion in "appropriate" cases. App. 80a-82a (citing *Sarei*, 550 F.3d at 824). In keeping with *Sarei*, which arose under the Alien Tort Statute ("ATS"), 28 U.S.C. 1350, the majority adopted a "prudential approach," which would require the district court, as a discretionary matter, to determine whether to impose an exhaustion requirement where a defendant affirmatively pleads failure to exhaust local remedies. App. 82a (citing *Sarei*, 550 F.3d at 832).

Judge Ikuta dissented on the ground that the FSIA does not explicitly contain an exhaustion requirement, and that the Ninth Circuit "should not take it upon [itself] to write an exhaustion requirement into the [FSIA] when Congress has chosen not to." App. 85a. Judge Ikuta further stated that Ninth Circuit case law

on prudential exhaustion in the context of the ATS was both inapposite and non-binding. App. 94a-97a.

On December 30, 2009, the Ninth Circuit ordered rehearing en banc. In its en banc decision affirming the district court, the majority agreed with the district court "that the plain language of the [FSIA] does not require that the foreign state against whom the claim is made be the entity which took the property in violation of international law." App. 17a. The majority also held that a plain reading of Section 1605(a)(3) revealed no explicit exhaustion requirement; that the ATS exhaustion requirement in *Sarei* was not analogous; and that Justice Breyer's statement in *Altmann* regarding exhaustion is dicta. App. 30a-33a.

Judge Gould, with whom Chief Judge Kozinski joined in dissent, stated that he "would reverse and remand with instructions for the district court to dismiss, on the theory that [FSIA], under 28 U.S.C. 1605(a)(3), has not waived the sovereign immunity of Spain or its instrumentality the Foundation." App. 38a. Judge Gould and Chief Judge Kozinski found Section 1605(a)(3) ambiguous, that Congress would not have intended Section 1605(a)(3) to strip Spain or the Foundation of their sovereign immunity, and that the majority's interpretation was contrary to both United States common law and the prevailing norms of international law. App. 38a-54a. Judge Gould and Chief Judge Kozinski stated that Section 1605(a)(3) requires an exhaustion of remedies, "as part and parcel of determining whether there had been a taking in violation of international law." App. 43a. Finding, however, "that a waiver of sovereign immunity arises only as against a sovereign that took property in

violation of international law," the dissenting judges did not further address the exhaustion issue. App. 43a.

REASONS FOR GRANTING THE PETITION

This petition squarely presents two related questions of international significance and recurring practical importance regarding the FSIA's expropriation exception that demonstrate a significant tension among courts of appeal. The Ninth Circuit's interpretation of Section 1605(a)(3) also contradicts the United States State Department's long-standing policies in international expropriation cases. Finally, the Ninth Circuit's decision violates Constitutional due process, basic principles of statutory construction, and established principles of international law. This case presents an ideal opportunity for resolution of these issues by this Court.

For these reasons, certiorari should be granted.

I. THE SOVEREIGN IMMUNITY ISSUES PRESENTED IN THIS CASE ARE OF INTERNATIONAL SIGNIFICANCE AND RECURRING PRACTICAL IMPORTANCE

Since the early 1800s, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). That venerable practice – which dates to shortly after the birth of the Republic, *see The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) – serves several important ends.

Recognition of the immunity of foreign nations from suit in United States courts began as "a gesture of comity between the United States and other sovereigns." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003); *see also Altmann*, 541 U.S. at 688 ("Chief Justice Marshall went on to explain * * * that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign."). This long-established common law principle of comity serves to safeguard the dignity of foreign nations, *see National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the power and dignity of the foreign sovereign") (internal quotation marks omitted), and to promote "the maintenance of friendly relations," Restatement (Third) of Foreign Relations Law of the United States, ch. 5, subch. A, intro. note (1987).

Absent these recognized principles of sovereign immunity, United States courts regularly would be called upon to sit in judgment of the acts of innocent foreign sovereigns – a practice this Court has recognized would "vex the peace of nations." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted); *see also id.* at 423; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (recognizing that a concern with

avoiding United States courts "pass[ing] on the legality of * * * governmental acts" underlies the doctrine of sovereign immunity); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another * * * rests at last upon the highest considerations of international comity and expediency"). This practice would be particularly offensive where, as here, the foreign sovereign did not act in violation of international law.

Since 1981, this Court has reviewed approximately 104 petitions where the FSIA was central to the questions presented. The Court granted fifteen of these petitions. The FSIA's growing importance and relevance is increasingly evident, as twelve of those fifteen petitions were granted in only the last ten years. Because the proper and uniform application of the FSIA is of such great importance, this Court routinely solicits the views of the Solicitor General who, together with the State Department, has filed amicus briefs in connection with a significant number of petitions involving the FSIA.[2]

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[2] *See, e.g.*, Brief of United States as *Amicus Curiae* in *Holy See v. Doe*, (09-1) at http://www.justice.gov/osg/briefs/2009/2pet/6invit/2009-0001.pet.ami.inv.pdf; Brief of United States as *Amicus Curiae* Supporting Affirmance in *Samantar v. Yousuf*, (08-1555) (emphasizing that Congress must "speak clearly when it intends to change common law principles") at http://www.justice.gov/osg/briefs/2009/3mer/1ami/2008-1555.mer.ami.pdf; Brief for the United States as *Amicus Curiae* in *Federal Ins. Co. v. Kingdom of Saudi Arabia*, (08-640) at http://www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0640.pet.ami.inv.pdf; Brief of United States as *Amicus Curiae* in *Beaty v. Republic of Iraq*, (07-1090, 08-539) at http://www.justice.gov/osg/briefs/2008/2pet/6invit/2007-

Because the interpretation and application of the FSIA and the parameters of sovereign immunity are long-standings issues of national and international importance that are likely to recur with even greater

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1090.pet.ami.inv.pdf; Brief of United States as *Amicus Curiae* in *Permanent Mission of India to the United Nations v. City of New York*, (06-134) (recommending reversal because the lower court's interpretation of the FSIA could "encourage foreign states to assert jurisdiction * * * or to take retaliatory actions against property of the United States abroad") at http://www.justice .gov/osg/briefs/2006/3mer/1ami/2006-0134.mer.ami.pdf; Brief of United States as *Amicus Curiae* Supporting Petitioner in *Powerex Corp. v. Reliant Energy Servs., Inc.*, (05-85) at http://www.justice .gov/osg/briefs/2006/3mer/1ami/2005-0085.mer.ami.pdf; Brief for United States as *Amicus Curiae*, in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, (04-1095) at http://www.justice.gov/osg/briefs/2005/2pet/6invit/2004-1095.pet.ami.inv.pdf; Brief of United States as *Amicus Curiae* Supporting Petitioners in *Austria v. Altmann*, (03-13) (recognizing that the United States "has a unique perspective on the government's sovereign immunity practice before enactment of the FSIA") at http://www.justice.gov/osg/briefs/2003/3mer/1ami/2003-0013.mer.ami.pdf; Brief of United States as *Amicus Curiae* in *Dole Food Co. v. Patrickson, et al.*, (01-593, 01-594) at http://www.justice.gov/osg/briefs/2001/2pet/6invit/2001-0593.pet.ami.inv.pdf (noting that the United States "has a substantial interest in the proper construction of the [FSIA] which presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts" and that the United States "has a significant stake in its correct application and has consistently participated in cases before this Court construing its terms"); Brief for the United States as *Amicus Curiae* in *Saudi Arabia v. Nelson*, (91-522) at 1992 WL 12012040; Brief for the United States as *Amicus Curiae* Supporting Respondents in *Republic of Argentina v. Weltover, Inc.*, (91-763) at 1992 WL 12012096; Brief for the United States as *Amicus Curiae* in *Verlinden, B.V. v. Central Bank of Nigeria*, (81-920) at 1981 WL 663901.

frequency in the coming years, the Court should grant this petition.[3]

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE FSIA CONFLICTS WITH THE STATE DEPARTMENT'S POLICY REGARDING INTERNATIONAL EXPROPRIATION CASES

As discussed above, the State Department often joins the Solicitor General's amicus briefs. This significant interest follows from the fact that the State Department was the entity responsible for drafting the FSIA. On its website, the State Department publicly acknowledges, in the context of espousing international expropriation claims, that it will not support a citizen's claim against a foreign sovereign unless a violation of international law giving rise to the claim was committed by that sovereign. The State Department's website, under the heading "Expropriation and U.S. Assistance" explicitly states that "[u]nder international law * * * the United States Government may only consider espousing (i.e. formally presenting) a claim to a foreign government if a claimant satisfies three prerequisites."[4]

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[3] Both the majority and the dissent below noted that the State Department's views are conspicuously absent in this case. App. 24a (noting the absence of a statement of interest from the State Department); App. 46a-47a ("Rather than asking the United States Department of Justice and United States Department of State to weigh in on the question whether the majority's statutory interpretation has diplomatic implications for the United States, the majority rushes head-long to give a procedural remedy to Cassirer.").

[4] This website is available at: http://www.state.gov/p/eur/rt/hlcst/c11383.htm.

> First, the claim must have been held by a U.S. citizen at the time the claim arose and continuously thereafter until the date of presentation, and through to settlement. Second, the acts giving rise to the claim *must constitute a violation of international law that is attributable to the foreign government. Finally, the claimant must exhaust local remedies in the relevant country, or demonstrate that doing so would be futile.*
>
> In order for the Department to consider taking action on a request for espousal, the claimant must provide sufficient evidence to establish that the claim meets these prerequisites.

(Emphasis added). The en banc majority's holding – that the violation of international law need not be attributable to the country against which the claim is made – contradicts United States policy as set forth by the State Department.[5] The Ninth Circuit's decision also disregards the long-given deference to the Executive Branch in matters relating to foreign affairs, as applied by this Court to World War II-era restitution claims in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).[6]

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[5] This has been the State Department's publicly stated policy since March 21, 2004, if not earlier. *See* http://web.archive.org/web/20040321004644/http://www.state.gov/p/eur/rt/hlcst/c11383.htm (last visited March 21, 2004).

[6] It is the petitioners' understanding that the State Department has expressed its espousal policy in the context of nation-to-nation claims, rather than individual-to-nation claims. This, however, appears to be a distinction without a difference: the State

It would be dangerously imprudent to disregard the State Department's point of view. This case does not warrant a World Court approach to jurisdiction, as the majority's position would permit. United States foreign policy has rejected such a position, as the United States withdrew, with limited exceptions, from the International Court of Justice in 1986 and has not joined the International Criminal Court. *See* Sean D. Murphy, Principles of International Law 135 (2006); Jennifer Elsea, Congressional Research Service, Report for Congress, U.S. Policy Regarding the International Criminal Court 2 (Aug. 29, 2006).

The Ninth Circuit's expansive interpretation of Section 1605(a)(3) will certainly open the floodgates by endowing United States courts with jurisdiction over *any* country owning or possessing *any* object allegedly taken at *any* time by *any* country.[7] Depriving Spain of

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Department's policy sets forth its legal interpretation of sovereign immunity and its understanding that a claim against a foreign sovereign cannot stand under international law unless "the acts giving rise to the claim * * * constitute a violation of international law that is attributable to the foreign government," and "the claimant * * * exhaust[s] local remedies in the relevant country, or demonstrate[s] that doing so would be futile."

[7] The need for this Court to offer guidance on the scope of the Section 1605(a)(3)'s expropriation exception – and more generally, to ensure that the FSIA's statutory exceptions do not swallow the FSIA's preservation of presumptive foreign sovereign immunity – is underscored by the relentless efforts of some states to facilitate suits against foreign sovereigns.

For example, in 2002, the California legislature enacted California Code of Civil Procedure Section 354.3, which extended the statute of limitations applicable to claims seeking restitution of alleged Nazi-looted art against museums and galleries, including time-barred claims, to December 31, 2010. Shortly after

its immunity because of an alleged Nazi wrongdoing violates Constitutional principles of due process. Spain would lose the sovereignty due to it with no showing, or even allegation, of complicity in the original wrongful taking. This would put an impossible burden on an innocent sovereign like Spain, which has neither knowledge of, nor complicity in, the events creating jurisdiction over it.

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the Ninth Circuit in *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1029 (9th Cir. 2009), *pet. for cert. filed*, 78 USLW 3629 (Apr. 14, 2010) (No. 09-1254), struck down Section 354.3 as an impermissible state encroachment on foreign affairs under *Garamendi*, the California Legislature passed, and the Governor signed, AB 2765. This bill amends California Code of Civil Procedure Section 338 to extend the statute of limitation from three years to six years for a claim asserting the "theft of any article of historical, interpretive, scientific, cultural, or artistic significance." The new law also expands the traditional discovery rule and provides that a cause of action does not accrue until the "actual discovery of the identity and whereabouts of the work of fine art and information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art." Finally, the new law ignores traditional choice of law rules and mandates that California law applies to the claim even where, as here, the property in dispute is not in California. Thus, if this law is applied to respondent's claim, California law controls even though the painting in dispute is located in Spain. In light of such aggressive efforts by a state to try to tell a foreign state how and where to resolve a property dispute, the foreign state's sovereign immunity becomes all the more important and provides the only reliable shield against stale property claims.

Prior to the passing of AB 2765, Petitioners believed that, if the action was returned to the district court, they could file a motion to dismiss on the ground that respondent's claims were time-barred. If, however, AB 2765 is applied to this case, respondent's claim may be timely and petitioners will be forced to submit to the district court's jurisdiction.

The Ninth Circuit's approach threatens to disrupt foreign sovereign immunity principles far beyond the United States. Foreign sovereign immunity derives in part from "fair dealing" and "reciprocal self-interest." *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008) (citation omitted). If a United States court deprives a foreign state of its immunity without any jurisdictionally significant act attributable to that sovereign, any United States government entity, agency, or instrumentality could face the same exposure to jurisdiction in foreign courts. *See De Sanchez v. Banco Central de Nicaragua*, 770 F.3d 1385, 1398 (5th Cir. 1985) ("In the field of international law, where no single sovereign reigns supreme, the Golden Rule takes on added poignancy."). Left undisturbed, the Ninth Circuit's decision will also affect the willingness of foreign nations, including the Kingdom of Spain, to engage in cultural, consular, and political activities in the United States for fear of being haled into court to answer for the actions of another sovereign. Similarly, the assertion of jurisdiction over foreign sovereigns in the absence of any assertion of wrongdoing will likely subject this country to jurisdiction of the courts of other nations in situations where the United States is not purported to have committed any wrongful act. Once a loss of sovereign immunity is disconnected from acts attributable to the sovereign, the international law of sovereign immunity is eviscerated.[8]

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[8] The fear of being forced to submit to the jurisdiction of United States courts is particularly great because a plaintiff's pleading requirements are so minimal. Under notice pleading rules, courts require only "a short and plain statement" of the grounds for jurisdiction and the claim for relief. Fed. R. Civ. P. 8(a)(1), (2); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts

The Ninth Circuit failed to heed this Court's admonition that great caution should be exercised in the assertion of jurisdiction over foreign defendants in view of "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction" as well as "the Federal Government's interest in its foreign relations policies." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987). Because this case presents questions with such serious political, diplomatic, and international implications and ramifications, it should be reviewed by this Court. Because the en banc majority's decision conflicts with State Department views, the Court should, at a minimum, solicit the State Department's views.

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE FSIA IS IN TENSION WITH INTERPRETATIONS OF OTHER CIRCUITS

Two other circuits have reviewed Section 1605(a)(3) and recognized that this immunity-stripping exception applies to nations that themselves have expropriated property in violation of international law. In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th

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do not apply a different (or higher) pleading standard for complaints that allege an exception to foreign sovereign immunity. *See, e.g, Doe v. Holy See*, 557 F.3d 1066, 1073-74 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3497 (2010). In fact, courts do not impose a heightened pleading standard in the absence of an explicit requirement in a statute or federal rule, *see Twombly* , 550 U.S. at 569 n.14. There is no such explicit requirement associated with the FSIA. *See Holy See*, 557 F.3d at 74.

Cir. 1984), the Fifth Circuit stated that "the legislative history of the FSIA indicates that Section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of that state." *Id.* at 204. In *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008), the D.C. Circuit stated that Section 1605(a)(3) "effectively require[es] that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law." *Id.* at 941.

One of the central purposes of the FSIA was to create a uniform body of law regarding immunity determinations involving foreign sovereigns. *See Verlinden*, 461 U.S. at 489 (quoting H.R. Rep. No. 94-1487, at 32) (recognizing "the importance of developing a uniform body of law in this area"); *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (noting that the FSIA was intended to develop "a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts"); *Altmann*, 541 U.S. at 699 (stating that one of the FSIA's "principal purposes" is to "clarify[] the rules that judges should apply in resolving sovereign immunity claims"). Conflicting interpretations by the Fifth, D.C., and Ninth Circuits undermine the purpose and goal of the FSIA.[9] The

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[9] The American Law Institute's Restatement supports the interpretation offered by the U.S. Courts of Appeal for the Fifth and D.C. Circuits and by petitioners that the defendant must be

Ninth Circuit's interpretation of Section 1605(a)(3) stands alone among the Circuits in holding that a foreign state that has not committed *any* violation of international law can be stripped of its sovereign immunity and subjected to the jurisdiction of American courts.

IV. THE NINTH CIRCUIT'S DECISION VIOLATES THE CONSTITUTION AND BASIC PRINCIPLES OF STATUTORY CONSTRUCTION

The Ninth Circuit's interpretation disregards the rudimentary rule of statutory construction that "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part." *Branch v. Smith*, 538 U.S. 254, 281 (2003). The Ninth Circuit's interpretation lacks merit because (1) the court erroneously read additional language into the statute that is inconsistent with common law and customary international law, (2) legislative history does not support the Ninth Circuit's inference that Congress intended the expropriation exception to apply to foreign sovereigns who have not committed a violation

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the foreign state that allegedly expropriated the property. *See* Restatement (Third) of Foreign Relations Law of the United States § 455 cmt. c (1987) ("[T]he FSIA provides that if the property was *taken by the foreign state* in violation of international law, and if the property is * * * owned or operated by an instrumentality *of the foreign state* that is engaged in commercial activity in the United States, there is a sufficient basis for jurisdiction to adjudicate claims to the property") (emphasis added). These observations support a very common-sense reading of a statute designed to afford sovereign nations immunity where they have done nothing wrong.

of international law, (3) legislative history supports petitioners' assertion that Congress intended the expropriation exception to apply only to a sovereign who has taken property in violation of international law, and (4) the Ninth Circuit's interpretation of the expropriation exception is impermissibly expansive. Apart from resolving the ambiguity surrounding Section 1605(a)(3), the Court should correct basic misconceptions of the FSIA that underlie much of this dispute. This case therefore presents the ideal "opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act." *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 307 (2d Cir. 1981).

A. The Expropriation Exception Is Ambiguous

Where "the intent of Congress is clear and unambiguously expressed by the statutory language," the analysis ought to end there. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). According to the en banc majority, because the text of the statute is written in the passive voice, Congress would have to rewrite the statute to include language stating that the property at issue must have been taken "by the foreign state" being sued in order to give it the meaning asserted by Petitioners. App. 17a. Thus, the majority argues, it follows that the statute must be read to include *any* foreign sovereign.

The meaning of the text, however, is not so plain. Section 1605(a)(3) does not expressly say that the property must be taken "by the foreign state," but neither does it expressly say the property must have been taken "by *any* foreign state." Congress would, in fact, have to rewrite the statute to include the

language "by any foreign state" in order to give it the meaning that the majority ascribes to it. It is not the role of the Ninth Circuit to read additional words into the statute. *See 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.").

The FSIA expropriation exception does, however, require a taking of property "in violation of international law." But *who* must have taken that property to constitute a violation of international law? And must a claimant exhaust local remedies in the relevant country? The lack of any clear answer to these questions demonstrates that the FSIA is ambiguous and thus subject to review of the legislative history for evidence of congressional intent. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (recognizing that where the meaning of a statutory provision is unclear, courts should look to legislative history); *see also Vencedora Oceanica Navigacion, S.A.*, 730 F.2d at 205 (Higginbotham, J., concurring in part and dissenting in part) ("The FSIA presents a peculiarly twisted exercise in statutory draftsmanship * * *. Congress chose to make the exceptions in Sections 1605-07 purposefully ambiguous, having decided to put their faith in the U.S. Courts, and thus attempted to provide only very modest guidance to the judiciary." (internal punctuation omitted)); *Texas Trading & Milling Corp.*, 647 F.2d at 302-03 (recognizing that drafters of the FSIA described it "as providing only 'very modest guidance' on issues of preeminent importance") (quoting Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 53 (1976)

(testimony of Monroe Leigh, Legal Adviser, Dep't of State)).

B. The Expropriation Exception Was Intended To Punish Or Hold Accountable A Country That Has Taken Property In Violation of International Law

The majority examined the legislative history but only to determine whether it "clearly indicates that Congress meant something other than what it said." App. 18a (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc)). That legislative history, according to the en banc majority, does not overcome the hurdle of plain meaning because it, in part, only emphasizes that a sovereign state's commercial activities lie outside its otherwise sovereign immunity. (*See* App. 18a-22a.) That was the wrong inquiry: as set forth below, the true question is whether the FSIA was intended by Congress to overrule longstanding principles of customary international law and United States common law. The legislative history clearly shows no evidence of such an intention.

The FSIA incorporates the concepts of the "Hickenlooper Amendment," which provided in pertinent part that disputes over expropriated property were justiciable when rights in property were asserted on the basis of a taking "by an *act of that state* in violation of the principles of international law." 22 U.S.C. 2370(e)(2) (emphasis added); *see also De Sanchez*, 770 F.2d at 1395 ("Section 1605(a)(3) of the FSIA * * * parallels the so-called 'Hickenlooper Exception' to the act of state doctrine * * *. Like the Hickenlooper Exception, Section 1605(a)(3) was

intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of the state.").

This Court recognized in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), that "Congress had *violations of international law by foreign states* in mind when it enacted the FSIA. For example, the FSIA specifically denies foreign states immunity in suits 'in which rights in property taken in violation of international law are in issue.'" *Amerada Hess*, 488 U.S. at 435 (quoting Section 1605(a)(3) (emphasis added)). The constitutional basis for the FSIA was, in part, Congress' authority under Article I, Section 8, Clause 10, to "define and punish * * * Offenses against the Law of Nations." *See also* H.R. Rep. No. 94-1487, at 14 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6613 (recognizing that sovereign immunity decisions are "best made by the judiciary on the basis of a statutory regime *which incorporates standards recognized under international law*") (emphasis added). In fact, this Court has recognized that stripping the immunity of a foreign state is a punishment akin to sanctions. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2191 (2009) ("Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions.").

This underscores that Congress and the Executive Branch intended Section 1605(a)(3) to eliminate sovereign immunity only for foreign nations who have taken property in violation of international law, and not innocent sovereigns who merely possess the

property. To this end, it is no coincidence that the FSIA's legislative history refers to Section 1605(a)(3) as the section governing "Expropriation claims," not wrongful possession claims. H.R. Rep. No. 94-1487, at 19 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618.

C. Exceptions to the FSIA Were Intended To Apply To Foreign States That Have Committed A Jurisdictionally-Significant Act

By permitting jurisdiction to lie absent a taking in violation of international law by Spain or the Foundation, the Ninth Circuit's approach would revolutionize the law of sovereign immunity and disrupt the FSIA's statutory scheme. An act or activity directly attributable to a sovereign is required to strip that sovereign's immunity under all of the FSIA's other exceptions. *See Pahneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (stating that "the foreign state retains its immunity when its agents act outside the scope of his authority" and holding that apparent authority is insufficient to confer jurisdiction under the commercial activity exception); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004) (agreeing with the Ninth Circuit that actual authority is required to confer jurisdiction under the commercial activity exception); *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (same); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103-05 (9th Cir. 1990) (waiver exception only applies if the foreign state defendant itself waived immunity); *Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000) (holding, under expropriation exception, that acts of another entity "cannot be attributed to a government that has not authorized the private entity to act on its

behalf"); *In re Republic of Philippines*, 309 F.3d 1143, 1150 (9th Cir. 2002) (stating, under immovable property exception, that the "FSIA's exceptions focus on actions taken by or against a foreign sovereign"); 28 U.S.C. 1605(a)(6) (recognizing that jurisdiction over actions to enforce an arbitration agreement is limited to agreements "made by the foreign state"); 28 U.S.C. 1605(a)(1) (requiring "official, employee, or agent" to be "acting within the scope of his or her office employment, or agency" under terror exception).

When a court interprets an act, it must do so wholistically. *See Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007) ("We recognize, in addition, that a proper interpretation of the Act requires a consideration of the entire statutory scheme."); *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006). The Ninth Circuit's holding that jurisdiction can lie over a foreign sovereign even though there is no jurisdictionally-significant act by that sovereign undermines a central principle underlying the international law of sovereign immunity and the FSIA's framework.[10] As a result, the Ninth Circuit's

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[10] Recognizing that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states," H.P. Rep. No. 94-1487, at 6-7, (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605, and that guidance was needed to explain when a lawsuit can be maintained against a foreign state or its entities and when a foreign state is entitled to retain its presumptive immunity, the drafters of the FSIA identified several situations where United States citizens may wish to seek recourse against a foreign state in United States courts.

> Instances of such contact occur when U.S. businessmen sell good[s] to a foreign state trading company, and disputes may arise concerning the purchase price.

reading of the expropriation exception is improperly inconsistent with the FSIA as a whole.

D. The Ninth Circuits' Interpretation Is Impermissibly Expansive And Violates Common Law

Earlier this year, this Court reaffirmed that sovereign immunity is rooted in common law. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010) ("The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976.") (citing *Verlinden*, 461 U.S. at 486). It is well-recognized that statutes in derogation of the common law are to be strictly and narrowly construed. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident"); *see also Samantar*, 130 S. Ct. at 2290 n.13; *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 371 (9th Cir. 1974) ("Any such rule of law, being in

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Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions of the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

Id. In each of the examples listed above, the acts giving rise to the dispute were committed by (or were attributable to) the foreign state (or related entity). There is no evidence that the creators of the FSIA envisioned that a foreign state should be stripped of its immunity for the unrelated actions of another foreign state.

derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law, farther than its words import." (quotation marks omitted)). Specifically, courts have repeatedly held that "because [the FSIA's] exceptions [to sovereign immunity] are in derogation of the common law, we must not read them broadly. Statutes in derogation of the common law are narrowly construed." *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 731 (7th Cir. 2000); *see also Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) ("[S]ilence does not suffice; appellants have identified no provision or feature of the FSIA that bespeaks intent to abrogate that common-law scheme with respect to former officials."); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1527, 1521 (D.C. Cir. 1983) (recognizing that the courts' job "is not to give the term [rights in immovable property under 28 U.S.C. 1605(a)(4)] the most expansive reading possible").[11]

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[11] The limited reach of the expropriation exception is evident when compared with Section 1605(a)(4) (the "succession exception"), which has the same grammatical structure. *See Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993) (recognizing that a statute "must be given 'as great an internal symmetry and consistency as its words permit'") (citation omitted). Like the expropriation exception, which applies to cases "in which rights in property taken in violation of international law are in issue," 28 U.S.C. 1605(a)(3), the succession exception is framed to afford jurisdiction over sovereign nations in cases "in which rights in property in the United States acquired by succession or gift * * * are in issue," 28 U.S.C. 1605(a)(4).

Congress intended the succession exception to apply to cases involving rights in property obtained by gift or inherited "by the foreign state," even though, as with the expropriation exception, that qualification is not expressed in the body of Section 1605(a)(4). H.R. Rep. No. 94-1487, at 20, (1976), reprinted in 1976

The FSIA establishes the sole exceptions to sovereign immunity, thus outlining when a suit is permitted against foreign nations in the United States, and these statutory exceptions must be strictly, not expansively, construed. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993); *see also id.* (recognizing as longstanding "the principle that 'statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

V. THE NINTH CIRCUIT'S DECISION VIOLATES LONG-STANDING PRINCIPLES OF INTERNATIONAL LAW

"Congress intended the FSIA to be consistent with international law * * *." *Trajano v. Marcos* (*In re Estate of Ferdinand E. Marcos Human Rights Litig.*), 978 F.2d 493, 497-98 (9th Cir. 1992). The central

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U.S.C.C.A.N. 6604, 6619 (stating that "a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited *by the foreign state* and situated or administered in the country where the suit is brought") (emphasis added). Under the Ninth Circuit's construction, however, the succession exception would create jurisdiction over any foreign state in possession of property that was, at one time, acquired by gift or succession by another foreign nation, or even another person. Congress did not intend such an extensive and illogical construction of Section 1605(a)(4), just as it did not intend such a construct of the expropriation exception.

premise of the FSIA is that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law." H.R. Rep. No. 94-1487, at 14 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6613. Section 1605(a)(3) "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987).

When customary international law provides that an act by a foreign state – specifically, the taking of property in violation of international law – is not a sovereign act, the foreign state is no longer entitled to sovereign immunity. International law supports the exercise of jurisdiction over foreign states that have taken property in violation of international law. No accepted principle of international law makes the possession of expropriated property, in and of itself, a violation of international law.

The concept of sovereign immunity has been broadly respected by other countries in their legal systems and in the system of international law. *See* Stacy Humes-Schulz, Limiting Sovereign Immunity in the Age of Human Rights, 21 Harv. Hum. Rts. J. 105, 109-10 (2008) ("State sovereignty and sovereign immunity fall into the category of customary international law * * *. [S]tates will generally accord other states immunity out of the belief that this is an unwritten but obligatory international rule."); Charles S. Rhyne, International Law 80 (1971) ("Corollary to a state's right of independence and equality is its immunity from suit in foreign courts by foreign

nationals. * * * In most states, this immunity from suit remains an absolute privilege."); *Verlinden*, 461 U.S. at 486-88 ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country. [Even under the FSIA, a] foreign state is normally immune from the jurisdiction of federal and state courts * * * subject to a set of exceptions * * *.").

It has long been understood in this country that statutes should not be construed to violate the law of nations if any other interpretation is possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (recognizing that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). The Ninth Circuit's holding that an alleged taking by Nazi Germany in violation of international law waives the sovereign immunity of an innocent nation that later acquires the property does not conform with customary international law. *See* Restatement (Third) of Foreign Relations Law of the United States § 207 ("A state is responsible for any violation of its obligations under international law * * *."); *see id.* § 712 ("A state is responsible under international law for injury resulting from * * * a taking by the state of the property of a national of another state * * *."). It is implausible that Congress, in enacting Section 1605(a)(3), intended to reject such settled principles of international law, particularly when the statute does not so state on its face.

VI. INTERNATIONAL LAW AND THE FSIA REQUIRE THE EXHAUSTION OF AVAILABLE REMEDIES

More than fifty years ago, the International Court of Justice noted that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law." *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 27. The court added that "[b]efore resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[12] *Id.* This required exhaustion of remedies has been repeatedly acknowledged. *See* Restatement (Third) of Foreign Relations law of the United States § 713 cmt. f, § 703 cmt. d. and rep. n.5 (the latter noting that exhaustion of remedies is a precondition for a complaint under numerous international human rights conventions); Second report on Diplomatic Protection, United Nations International Law Commission, U. N. Doc. A/CN. 4/514 (Feb. 28, 2001).

In *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Judgment, 1989 I.C.J. 15, the

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[12] It is noteworthy that Germany, following World War II, implemented an extensive process to compensate the victims of Nazi persecution, including more than four million claims and paying more than DM 72 billion for claims settled. The summary of these compensation programs by the U.S. Department of State and Department of Justice ("German Compensation for National Socialist Crimes") is available at: http://www.ushmm.org/assets/frg.htm.

International Court of Justice described the exhaustion of local remedies as not just a rule, but an "important principal of customary international law." 1989 I.C.J 15, ¶ 50. In that case, the question arose whether the exhaustion of remedies requirement could apply to a case brought under Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States. That Article, like the FSIA, was unqualified by any reference to the exhaustion of remedies. The ICJ found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." *Id.* Since the FSIA's expropriation exception requires a taking of property "in violation of international law," and because there can be no such violation until the claimant has exhausted available remedies, the FSIA's language implicitly incorporates the exhaustion requirement.

The FSIA "codif[ied] * * * international law at the time of the FSIA's enactment." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). By incorporating prevailing norms of international law, and providing for uniform treatment of foreign sovereigns pursuant to prevailing international law, the FSIA sought to avoid friction with foreign countries and to ensure reciprocal treatment for United States interests abroad. *See* Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 34 (2d ed. 2003) (citing, *inter alia*, 1976 U.S.C.C.A.N. at 6607-08, 6611, 6620, 6626, 6630, 6632); *see also* 1976 U.S.C.C.A.N. at 6605-06 (noting that, under the FSIA, "U.S. immunity practice would conform to the practice in virtually every other country").

United States courts have also recognized that exhaustion is a "well-established rule of customary international law." *Sarei*, 550 F.3d at 829 (quoting *Interhandel*). Lower courts have also held that a violation of international law requires that "the State where the violation has occurred should have an opportunity to redress takings by its own means, within the framework of its own domestic legal system." *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996). Thus, a "taking" in violation of international law has not occurred when a plaintiff does not exhaust local remedies. *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998); *see also Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (property not taken in violation of due process of law where available procedures are not pursued), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986). The Department of State's express position is that even a United States citizen must exhaust local remedies in the relevant country.[13]

Because United States courts must import well-settled principles of international law to define rights in cases brought under the FSIA, they must also import the well-settled limitations to such causes of action, including the doctrine of exhaustion of remedies. *See Sarei*, 550 F.3d at 833-35 (Bea, J., concurring) (discussing exhaustion in the context of the ATS). The FSIA must be construed consistently

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[13] *See* State Department website at: http://www.state.gov/p/eur/rt/hlcst/c11383.htm (mandating that the "the claimant must exhaust local remedies in the relevant country, or demonstrate that doing so would be futile").

with standards of international and common law, and may not be interpreted to depart from them *sub silentio*.

In *Altmann*, Justice Breyer, joined by Justice Souter, indicated that they would likely read Section 1605(a)(3) to require the exhaustion of remedies and that "[a] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking. * * * A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the expropriating state may have trouble showing a tak[ing] in violation of international law." *Altmann*, 541 U.S. at 714 (Breyer, J., concurring) (internal quotation marks omitted).[14] Finding "that a waiver of sovereign immunity arises only as against a sovereign that took property in violation of international law," the dissent below did not further address the exhaustion issue in this case. App. 43a. Should this Court find that the en banc majority's position warrants further review, this case is the perfect vehicle for the Court to decide whether the FSIA incorporates the exhaustion of domestic remedies requirement long-recognized by customary international law and United States common law.

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[14] This Court has long acknowledged the general rule that parties must exhaust available alternative remedies before seeking relief from the federal courts. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 & n.9 (1938) (recognizing an exhaustion requirement in cases dating as far back as 1898). "[E]xhaustion is 'a rule of judicial administration,' * * * and unless Congress directs otherwise, rightfully subject to crafting by judges." *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 518 (1982).

VII. THE INTERLOCUTORY NATURE OF THE APPEAL IS NOT A BAR TO REVIEW BY THIS COURT

Petitioners recognize that certiorari from interlocutory appeals is disfavored, *see, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review"). However, "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review," Robert L. Stern et al., Supreme Court Practice § 4.18, at 282 (9th ed. 2007); *see also id.* § 4.18, at 281 (noting that when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"). Accordingly, this Court has not hesitated to review an interlocutory judgment of a court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); *see also, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (recognizing that this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower courts"); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (granting certiorari to review interlocutory order where "effect of the order is immediate and irreparable, and any

review by this Court of the propriety of the order must be immediate to be meaningful"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (reviewing court of appeals' reversal of a district court's denial of a motion to dismiss a complaint because "fundamental to the further conduct of the case"). Because the uniform interpretation of the FSIA is of such great importance, this Court frequently grants certiorari from interlocutory appeals asserting challenges to the FSIA. *See, e.g., Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2188 (2009); *Permanent Mission of India*, 551 U.S. at 197; *Altmann*, 541 U.S. at 681.

This case clearly presents an issue which is "fundamental to the further conduct of the case." *Land*, 330 U.S. at 734 n.2. Absent this Court's intervention, Petitioners will be forced to submit to the jurisdiction of United States Courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: December 10, 2010

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed August 12, 2010]

No. 06-56325
D.C. No. 05-CV-03459-GAF

CLAUDE CASSIRER,
Plaintiff-Appellee,

v.

KINGDOM OF SPAIN,
a foreign state,
Defendant,

and

THYSSEN-BORNEMISZA
COLLECTION FOUNDATION,
an agency or instrumentality
of the Kingdom of Spain,
Defendant-Appellant.

No. 06-56406
D.C. No. CV-05-03459-GAF

CLAUDE CASSIRER,

Plaintiff-Appellee,

v.

KINGDOM OF SPAIN,
a foreign state,
Defendant-Appellant,

and

THYSSEN-BORNEMISZA
COLLECTION FOUNDATION,
an agency or instrumentality
of the Kingdom of Spain,
Defendant

OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
March 24, 2010—San Francisco, California

Filed August 12, 2010

Before: Alex Kozinski, Chief Judge, Pamela Ann Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Consuelo M. Callahan, Carlos T. Bea and N. Randy Smith, Circuit Judges.

Opinion by Judge Rymer;
Dissent by Judge Gould

COUNSEL

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Stuart R. Dunwoody, Davis Wright Tremaine LLP, Seattle, Washington, for the plaintiff-appellee.

OPINION

RYMER, Circuit Judge:

Claude Cassirer is an American citizen whose grandmother's Pissarro painting was allegedly confiscated in 1939 by an agent of the Nazi government in Germany because she was a Jew. He filed suit in federal district court to recover the painting, or damages, from the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation, an instrumentality of Spain, which now claims to own the painting. Spain and the Foundation moved to dismiss, asserting, among other things, sovereign immunity pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, *et seq*. The FSIA makes a foreign state immune from suit in the courts of the United States unless an exception applies. The district court denied the motions, *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), and also denied motions to dismiss for lack of a case or

controversy, personal jurisdiction, and proper venue. Spain and the Foundation appealed, raising most of these issues.

Cassirer relies on the "international takings" or "expropriation" exception in the FSIA that confers subject matter jurisdiction over a foreign state when "rights in property taken in violation of international law" are at issue; the property is owned "by an agency or instrumentality of the foreign state"; and the instrumentality "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Spain and the Foundation maintain that this exception is not applicable because the painting was taken in violation of international law by Germany, not by either of them, and because the Foundation is not engaged in commercial activity in the United States sufficient to trigger the exception. Spain contends that Cassirer should have exhausted remedies in Germany or Spain, but failed to do so. Spain also contests the existence of a case or controversy, while the Foundation challenges the exercise of personal jurisdiction.

Our review is constrained because this is an appeal before final judgment has been entered. Generally, we may review only final decisions of a district court, but our jurisdiction also extends to a small category of collateral orders that are separate from the merits and can't effectively be reviewed on appeal from a final judgment. A ruling that denies sovereign immunity is such an order. Consequently, we may hear the appeal taken from the district court's order denying the motions to dismiss for lack of subject matter jurisdiction based on sovereign immunity. But its decision declining to dismiss the action for lack of personal jurisdiction and a case or controversy is fully

reviewable on appeal after judgment. For this reason we have no appellate jurisdiction over these issues, and will dismiss the appeal as to them.

On the issue of sovereign immunity, we conclude that § 1605(a)(3) does not require the foreign state against whom the claim is made to be the one that took the property. We are satisfied that the record supports the district court's finding of a sufficient commercial activity in the United States by the Foundation. The statute does not mandate that the plaintiff exhaust local remedies for jurisdiction to lie, and we do not consider a prudential exhaustion analysis given our limited appellate jurisdiction. This being so, we will affirm the order that the expropriation exception applies such that the court has subject matter jurisdiction over the action as to both Spain and the Foundation.

I

The property at issue is an oil painting by the French impressionist master Camille Pissarro, *Rue Saint-Honoré, après-midi, effet de pluie*.[1] It was completed in 1897 and sold in 1898 to Cassirer's great-grandfather, Julius Cassirer, who lived in Germany. The painting remained in the family for some forty years, eventually passing to Lilly Cassirer, Cassirer's grandmother, upon her husband's death. She later remarried.

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[1] Except as noted, we take the facts as alleged in the complaint as true because we are reviewing a denial of a motion to dismiss. *Altmann v. Republic of Austria*, 317 F.3d 954, 961-62 (9th Cir. 2002), *amended by* 327 F.3d 1246 (9th Cir. 2003), *aff'd by* 541 U.S. 677 (2004).

In 1939 Lilly decided she had no choice but to leave Germany. By that time — as the district court judicially noticed — German Jews had been deprived of their civil rights, including their German citizenship;[2] their property was being "Aryanized"; and the Kristallnacht pogroms had taken place throughout the country. Permission was required both to leave and to take belongings. The Nazi government appointed Munich art dealer Jakob Scheidwimmer as the official appraiser to evaluate the works of art, including the Pissarro painting, that Lilly wished to take with her. Scheidwimmer refused to allow her to take the painting out of Germany and demanded that she hand it over to him for approximately $360. Fearing she would not otherwise be allowed to go, and knowing she would not actually get the money because the funds would be paid into a blocked account, Lilly complied.

Scheidwimmer traded the painting to another art dealer, who was also persecuted and fled Germany for Holland. After Germany invaded Holland, the Gestapo confiscated the painting and returned it to Germany, where it was sold at auction to an anonymous purchaser in 1943. It turned up at a New York gallery in 1952 and was sold to a St. Louis collector; it was sold again in 1976 to a New York art dealer who, in turn, sold it to Baron Hans-Heinrich Thyssen-Bornemisza. Bornemisza lived in Switzerland and was a preeminent private collector.

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[2] Citizenship matters because we have held that the takings exception, at issue here, does not apply where the plaintiff is a citizen of the country that expropriates his property. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990). The district court's determination that Lilly was no longer regarded by Germany as a German citizen is not challenged on appeal.

In 1988, Spain paid the Baron $50 million to lease his collection for ten years. Five years into the lease, Spain paid the Foundation $327 million to purchase the entire collection, including the Pissarro painting. As part of the agreement, Spain provided the Villahermosa Palace in Madrid to the Foundation, free of charge, for use as the Thyssen-Bornemisza Museum.

Claude Cassirer, Lilly's heir, discovered in 2000 that the painting was on display at the Thyssen-Bornemisza Museum in Madrid. He asked Spain's Minister for Education, Culture and Sports, who was chair of the Foundation's board, to return it. The request was refused. In 2003, five members of Congress wrote the Minister requesting return of the painting; this request, too, was rejected. Cassirer did not try to obtain the painting through judicial proceedings in Spain, or to pursue other remedies in Spain or Germany, before bringing suit in the United States.

He filed this action against the Foundation and Spain in the Central District of California on May 10, 2005. The complaint avers that Germany confiscated the painting based on Lilly's status as a Jew and as part of its genocide against Jews; hence the taking was in violation of international law. It alleges that the Foundation is engaged in numerous commercial activities in the United States that include borrowing art works from American museums; encouraging United States residents to visit the museum and accepting entrance fees from them; selling various items to United States citizens including images of the painting; and maintaining a web site where United States citizens may buy admission tickets using United States credit cards and view the paintings on

display, including *Rue Saint-Honoré, après-midi, effet de pluie*. The complaint seeks imposition of a constructive trust and return of the painting or, alternatively, recovery of damages for conversion.

The Foundation filed a motion to dismiss based on lack of subject matter and personal jurisdiction, and improper venue. Spain followed with its own motion to dismiss. The district court allowed Cassirer to conduct jurisdictional discovery into the Foundation's commercial activity in the United States. Both motions were then denied. The court certified the matter for interlocutory appeal under 28 U.S.C. § 1292(b), though Spain and the Foundation abjured this route in favor of appeal on the basis of the collateral order doctrine.

In this court, Cassirer filed a motion to dismiss as to issues other than those pertaining to sovereign immunity on the ground that appellate jurisdiction is lacking.[3] The original panel agreed that the district court's denial of motions to dismiss for lack of personal jurisdiction and case or controversy is not immediately appealable as a collateral order. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1054-55 (9th Cir. 2009). The panel held that § 1605(a)(3) does not require Spain to be the entity that expropriated the painting in violation of international law, and that the Foundation, which owns the painting, engaged in sufficient commercial activity in the United States to satisfy the FSIA. It further held that exhaustion is not statutorily required; however, a majority concluded

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[3] Cassirer also moved to expedite the Foundation's appeal. We granted this motion and *sua sponte* ordered the appeals to be consolidated.

that the district court erred in failing to conduct a prudential exhaustion analysis, and remanded for it to do so. We decided to rehear the case en banc. *Cassirer v. Kingdom of Spain*, 590 F.3d 981 (9th Cir. 2009).[4]

II

We must consider the bounds of our appellate jurisdiction at the outset. By statute, 28 U.S.C. § 1291, we have jurisdiction to review "final decisions" of the district court. A final decision is one that ends the litigation on the merits, *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003), which no decision that is before us does. Still, we may review "a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final.' " *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.*

It is well settled that sovereign immunity is within this small category of cases from which an immediate appeal will lie. *See, e.g., Gupta v. Thai Airways Int'l,*

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[4] As part of our en banc process we asked the parties to file simultaneous briefs as to whether this matter should be reheard en banc. Spain and the Foundation took the position that rehearing en banc is unnecessary because they intend to file a motion to dismiss the complaint on the ground that the claims are time-barred under *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009). We express no opinion on the merits of this proposition.

Ltd., 487 F.3d 759, 763-65 (9th Cir. 2007); *In re Republic of the Philippines*, 309 F.3d 1143, 1148-49 (9th Cir. 2002). The point of immunity is to protect a foreign state that is entitled to it from being subjected to the jurisdiction of courts in this country, protection which would be meaningless were the foreign state forced to wait until the action is resolved on the merits to vindicate its right not to be in court at all. Thus, we have jurisdiction to review the district court's order denying sovereign immunity.

The same is not true of the court's orders denying motions to dismiss for lack of a case or controversy and personal jurisdiction. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988), and *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003), both recognize that denial of a motion to dismiss for lack of personal jurisdiction is neither a final decision nor appealable under the collateral order doctrine. The FSIA presents a novel situation, however, in that personal jurisdiction over a foreign state exists under the statute if it is not immune and if proper service has been made. 28 U.S.C. § 1330(b); *Altmann*, 317 F.3d at 969. Because the one follows from the other, the rulings arguably are so related that we should consider extending our collateral order jurisdiction over sovereign immunity to resolve personal jurisdiction as well. *See Swint*, 514 U.S. at 50-51 (discussing but not deciding whether a court of appeals with jurisdiction over one ruling can review related rulings that are not themselves independently reviewable). We see no reason to do so here, for the decision points are different.

[1] The Foundation argues that exercising personal jurisdiction offends due process. To resolve this argument, we would need to decide whether a foreign

state or an instrumentality of a foreign state is a "person" for purposes of the Due Process Clause, whether the FSIA incorporates the requirements of "minimum contacts," and whether the Foundation has sufficient minimum contacts with the United States to support general or specific jurisdiction. Its stance on sovereign immunity, on the other hand, turns on whether the takings exception applies only to a foreign state that has itself taken property in violation of international law, and whether the Foundation has engaged in a commercial activity in the United States. In short, a decision that a foreign state is not entitled to sovereign immunity under the FSIA is not "inextricably intertwined" with a decision that the exercise of personal jurisdiction comports with due process. *See id.* at 51. Therefore, we decline to expand our collateral order jurisdiction to append review of the latter to the former.

[2] Although we have not previously addressed whether denial of a motion to dismiss for lack of a case or controversy is an immediately appealable collateral order, other circuits have indicated that questions of standing, case or controversy, and ripeness are, like the question of personal jurisdiction, not immediately appealable. *See, e.g.*, *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998) (standing); *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993) (same); *Crymes v. DeKalb County*, 923 F.2d 1482, 1484 (11th Cir. 1991) (ripeness); *Shanks v. City of Dallas*, 752 F.2d 1092, 1098 n.9 (5th Cir. 1985) (case or controversy and standing); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 474-75 (2d Cir. 1974) (ripeness and standing), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). We routinely consider these issues on appeal

from a final judgment, *see, e.g.*, *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009), and are not persuaded that the district court's order refusing to dismiss this action for lack of a case or controversy should be immediately appealable. While a favorable ruling would remove Spain from the lawsuit just as immunity would do, so too would prevailing on a myriad of other pretrial motions. Achieving an effectively similar result is no reason to bring denial of such motions within the "small category" of decisions that merit immediate review, otherwise the category would be small no longer.

[3] Accordingly, we have no appellate jurisdiction to review the district court's denial of motions to dismiss for lack of personal jurisdiction and a case or controversy.

III

As both the Supreme Court and we have explained the genesis of the FSIA at length, *see Republic of Austria v. Altmann*, 541 U.S. 677, 688-91 (2004); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705-06 (9th Cir. 1992), we will not do so again except to say that in 1976, Congress codified the "restrictive principle" of sovereign immunity with "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488). The "restrictive principle," then embraced by most nation states, recognized immunity for public acts, that is to say, acts of a

governmental nature typically performed by a foreign state, but not for acts of a private nature even though undertaken by a foreign state. Commercial activity is a good example of conduct that would ordinarily be engaged in by a private entity. If a foreign state is not entitled to immunity, then it is liable on claims for relief just like a private individual. 28 U.S.C. § 1606.

"The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality . . . ." *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 620 (1983); H.R. Rep. No. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 ("The bill is not intended to affect the substantive law of liability.").[5] Put differently, the FSIA simply limits the jurisdiction of American courts to hear claims against foreign states. It creates no cause of action.

Sovereign immunity is a threshold issue because it goes to the court's subject matter jurisdiction. It is a question of law that we review de novo, although to the extent informed by factual findings made by the district court, those findings are reviewed for clear error.

Under the statutory scheme, a district court has subject matter jurisdiction over claims against a foreign state with respect to which the foreign state is

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[5] The House bill was passed in lieu of the Senate bill, so the House Report is the operative legislative history.

not entitled to immunity. 28 U.S.C. § 1330(a).[6] A foreign state is immune except as specified in the FSIA. 28 U.S.C. § 1604.[7] The FSIA has a number of exceptions,[8] but Cassirer invokes only the "expropriation" exception in § 1605(a)(3). Section 1605(a)(3) provides that a foreign state is not immune in any case

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or

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[6] Section 1330(a) provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

[7] Section 1604 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

[8] There are exceptions for waiver, *id.* § 1605(a)(1); commercial activity, *id.* § 1605(a)(2); expropriation, *id.* § 1605(a)(3); succession, *id.* § 1605(a)(4); personal injury in the United States, *id.* § 1605(a)(5); arbitration, *id.* § 1605(a)(6); maritime liens, *id.* § 1605(b); terrorism, *id.* § 1605A; and counterclaims, *id.* § 1607.

> any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

So far as the first condition is concerned, a taking offends international law when it does not serve a public purpose, when it discriminates against those who are not nationals of the country, or when it is not accomplished with payment of just compensation. *See Siderman*, 965 F.2d at 711-12; *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 831-33 (9th Cir. 1987). As we noted in *Siderman*, both the House Report on the FSIA and the Restatement of Foreign Relations Law reflect a similar understanding.[9] "At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " *Siderman*, 965 F.3d at 711 (quoting *West*, 807 F.2d at 826). On appeal, neither Spain nor the Foundation contends that Germany's actions with respect to the painting were not a taking in violation of international law.

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[9] The House Report describes the phrase "taken in violation of international law" as including expropriations that are "arbitrary or discriminatory in nature," or done "without payment of the prompt adequate and effective compensation required by international law." 965 F.2d at 712 (quoting H.R. Rep. No. 94-1487, at 19-20). The Restatement provides that a foreign state is responsible for injury from a taking that "(a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation. . . ." Restatement (Third) of Foreign Relations Law of the United States § 712 (1987).

So far as the commercial activity prong is concerned, just the second clause is pertinent here as there is no dispute the painting is not "present in the United States." Thus, there is jurisdiction under § 1605(a)(3) if the Foundation, which admittedly owns the painting and concedes it is an instrumentality of Spain for purposes of the statute, "is engaged in a commercial activity in the United States." "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

With this by way of background, we turn to the questions that are dispositive here: whether § 1605(a)(3) covers a claim against Spain and the Foundation when neither was the foreign state that took the painting in violation of international law; whether the Foundation is engaged in a sufficient commercial activity in the United States; and whether exhaustion of remedies is required as a prerequisite to jurisdiction.

A

The Foundation's lead point, joined by Spain, is that the takings exception applies only to the foreign state that expropriated the property and not to some later purchaser who was not complicit in the taking. More specifically, the Foundation contends that because the language of § 1605(a)(3) does not identify the taker, the text can as easily be read to imply a

taking "by *the* foreign state" as a taking "by *any* foreign state."

[4] We agree with the district court that the plain language of the statute does not require that the foreign state against whom the claim is made be the entity which took the property in violation of international law. Section 1605(a)(3) simply excepts from immunity "a foreign state" in any case "in which rights in *property taken in violation of international law* are in issue." (emphasis added). The text is written in the passive voice, which "focuses on an event that occurs without respect to a specific actor." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (so observing with respect to the phrase "if the firearm is discharged"); *see Watson v. United States*, 552 U.S. 74, 80-81 (2007) (noting that use of the phrase "to be used" reflects "agnosticism . . . about who does the using"). Thus, the text already connotes "*any* foreign state." It would have to be rewritten in order to carry the meaning the Foundation ascribes to it. That is, the statute would need to say that a foreign state is not immune in a case "in which rights in property taken *by the foreign state* in violation of international law are in issue."

[5] In the normal event our task is over when a statute is clear on its face. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). The rule is no different with the FSIA. *See, e.g., Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087-88 (9th Cir. 2007) ("In interpreting the FSIA, we first look to the plain meaning of the language employed by Congress." (internal quotation marks and citation omitted)); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (observing in an FSIA case

that "[w]e assume . . . 'the ordinary meaning of [the statutory] language accurately expresses the legislative purpose' " (quoting *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1473 (9th Cir. 1995))). Thus, we take the plain meaning of the text to be the meaning that Congress intended. As the words and grammatical construct in § 1605(a)(3) are clear, we understand that Congress meant for jurisdiction to exist over claims against a foreign state whenever property that its instrumentality ends up claiming to own had been taken in violation of international law, so long as the instrumentality engages in a commercial activity in the United States.[10]

Although the Foundation argues that evolution of the takings exception undermines this interpretation, it points to nothing in the legislative history which "clearly indicates that Congress meant something other than what it said." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (describing the standard) (internal quotation marks omitted). Instead, relying on two Fifth Circuit decisions, *Vencedora Oceanica Navigacion, S.A. v.*

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[10] The dissent invokes "another principle of statutory construction," dis. op. at 11500, which we disagree is applicable. It is that statutes in derogation of the common law are to be strictly construed. In the dissent's view, the common law gives sovereign nations like Spain a sovereign immunity. For this it relies on the Supreme Court's statement in *Samantar v. Yousuf*, 130 S Ct. 2278 (2010), that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Id.* at 2284. But the Court also made clear that "[a]fter the enactment of the FSIA, the Act — and not the pre-existing common law — indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* at 2285.

Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 204 (5th Cir. 1984), and *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985), and § 455 of the Restatement (Third), it claims that courts and commentators have long understood that the exception applies only to states that have done the taking. *Vencedora* was concerned with whether Algeria or an Algerian-owned corporation that had towed an abandoned vessel "owned or operated" it; in that context, the court stated that the legislative history of the FSIA indicates that § 1605(a)(3) was intended to reach any foreign agency that expropriated property or is using expropriated property taken by another branch of the foreign state. 730 F.2d at 204 (citing 1976 U.S.C.C.A.N. 6604, 6618).[11] The court held

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[11] The cited portion of the House Report explains the expropriation exception and states:

> (a)(3) Expropriation claims.— Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (I) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

that the Algerian-owned corporation did not assume control of the vessel for the benefit of the Algerian government. *Vencedora* thus speaks to a different issue; the court had no occasion to comment on whether the taker and the defendant must be the same. The statement upon which the Foundation relies does not, in any event, say the opposite; that is, it does not say that § 1605(a)(3) applies *only* to the state that has done the wrongful expropriating. *De Sanchez* does nothing more than quote *Vencedora*.[12] Neither persuades us that Congress clearly meant something other than what it said in § 1605(a)(3). Nor does the

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> The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).

H.R. Rep. No. 94-1487, at 19-20.

[12] It does so in explicating the so-called "Hickenlooper Exception" to the act of state doctrine. The "Hickenlooper Exception" is a shorthand reference to 22 U.S.C. § 2370(e)(2), which prohibited courts from declining on the ground of the act of state doctrine to determine the merits in cases where a claim to property is asserted based on a taking "by an act of that state in violation of the principles of international law." Whether or not § 1605(a)(3) was intended to parallel or incorporate the concepts of the Hickenlooper Exception, as the dissent suggests, the observation is inapposite because the act of state doctrine is *a substantive defense on the merits that is distinct from immunity*. *See Samantar*, 130 S. Ct. at 2290-91. Besides this, the Hickenlooper Exception shows that Congress knows how to write "*that* state" when it wants to.

Restatement,[13] which paraphrases what the FSIA provides but sheds no light on congressional intent.

Our reading of the text is buttressed by the articulated purpose of the FSIA to immunize foreign states for their public, but not for their commercial, acts. As Congress declared: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." 28 U.S.C. § 1602 (Findings and Declaration of Purpose). Consistent with this purpose, § 1605(a)(3) restricts jurisdiction over an entity of a foreign state that owns property taken in violation of international law to those engaged in commercial

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[13] Section 455 provides:

> (3) Courts in the United States have jurisdiction with respect to claims to property taken by a foreign state in violation of international law if
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> . . .
>
> (b) the property (or the proceeds thereof) is owned or operated by an instrumentality of the state and that instrumentality is engaged in commercial activity in the United States.

Restatement (Third) § 455. The comment, upon which the Foundation also relies, states that

> the FSIA provides that if the property was taken by the foreign state in violation of international law, and if the property is . . . owned or operated by an instrumentality of the foreign state that is engaged in commercial activity in the United States, there is a sufficient basis for jurisdiction to adjudicate claims to the property.

activity in the United States. No other restriction is manifest.[14]

The Foundation asks us to compare § 1605(a)(3) with § 1605(a)(4), which is known as the "succession" exception, and to follow how we construed that exception in *Republic of Philippines*, 309 F.3d at 1150-51. Section 1605(a)(4) exempts a foreign state from immunity in any case "in which rights in property in the United States acquired by succession . . . are in issue." As the Foundation points out, the word "acquired" is not followed by the phrase "by the foreign state," yet this is the meaning we gave to the exception in *Republic of Philippines*. In that case, creditors of the Estate of Ferdinand E. Marcos sought to collect Marcos assets held by Merrill Lynch; Merrill Lynch filed an interpleader action to resolve conflicting claims, naming, among possible claimants, the Republic of the Philippines. The Republic asserted sovereign immunity; the creditors relied on the succession exception even though the Republic had not

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[14] Nor does the literal language strike us as so absurd that Congress couldn't possibly have meant to provide a forum for adjudicating claims to property previously taken in violation of international law that is currently held by a different foreign state or its instrumentality, when the requisite nexus of commercial activity exists in the United States. Doing so is consistent with the familiar notion that a purchaser cannot get good title if property has been stolen at any place along the line, which is the general rule at common law. *See, e.g.*, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 633-34 (2000) ("[O]ne who purchases, no matter how innocently, from a thief, or all subsequent purchasers from the thief, acquires no title in the property. Title always remains with the true owner."); *see also* U.C.C. § 2-403 (seller can only transfer the title that it possesses).

acquired any right in the assets by succession. The creditors argued that jurisdiction nevertheless attached because the statute requires only that rights acquired by succession be in issue, not necessarily the rights of the sovereign. We concluded that the exception applies only when the foreign state's interest is as a successor to a private party. In so doing, we relied in part on legislative history which explains that immunity may not be claimed under this exception when the suit against the foreign state relates to property that it has obtained by gift or inheritance and that is located or administered in the country where suit is brought, because in this capacity — asserting rights in an estate — " 'the foreign state claims the same right which is enjoyed by private persons.' " *Id.* at 1151 (quoting H.R. Rep. No. 94-1487, at 20). In other words, to conform to the FSIA's declared purpose, we read § 1605(a)(4) as exempting a foreign state only if it were claiming rights as a successor because it is only in that role that it is acting like a private person. By contrast, § 1605(a)(3) on its face confers jurisdiction over a foreign state only if the foreign state that is sued claims to own illegally confiscated property *and* acts like a private person by engaging in a commercial activity in the United States. Section 1605(a)(3), therefore, is already consonant with the purpose of the FSIA.

Finally, the Foundation posits that bizarre consequences unintended by Congress will occur if § 1605(a)(3) is interpreted as granting jurisdiction against foreign entities regardless of who did the expropriating or when, and regardless of whether the

defendant was a good faith purchaser.[15] We cannot say whether floodgates might open, but in any event, jurisdictional boundaries are for Congress to set, not for courts to write around. This said, restraints are in place that deflect the risk. The FSIA is purely jurisdictional; it doesn't speak to the merits or to possible defenses that may be raised to cut off stale claims or curtail liability. In addition, the statute constrains its own reach by restricting jurisdiction to rights in property, taken in violation of international law, that is now in the hands of a foreign state or its instrumentality, when that instrumentality is engaged in a commercial activity in the United States. And decisional law further limits the universe of potential claimants, for instance, by excluding nationals of the expropriating country from the scope of § 1605(a)(3). *See, e.g.*, *Siderman*, 965 F.2d at 711; *Chuidian*, 912 F.2d at 1105.[16]

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[15] Whether Spain was a good faith purchaser is not, of course, before us. The bona fides of its acquisition will no doubt be raised in defense on the merits, but is not a factor in the jurisdictional calculus. Likewise, the dissent's concern that a taking by one country can waive the sovereign immunity of "some innocent nation that comes upon the property later through legitimate means," dis. op. at 11499, is premature. The Restatement sections upon which it relies speak to potential liability, not to immunity from suit. *See* Restatement (Second) of Foreign Relations Law of the United States §§ 164, 183 (1965); Restatement (Third) §§ 207, 712. They simply indicate that a state is responsible under international law for injury that is attributable to it or for which it failed to take reasonable preventive or punitive measures. But this case is not yet to the stage where these principles are in play.

[16] The dissent faults us for taking no heed of the fact that there may be "important diplomatic implications" of our decision. Dis. op. at 11496. However, this case involves a private dispute of the sort that Congress had in mind when enacting the FSIA.

[6] In sum, the statute states that the property at issue must have been "taken in violation of international law." It does not state "taken in violation of international law by the foreign state being sued." The legislative history does not clearly indicate that Congress meant something other than what it said. Indeed, the text would have to be redrafted to say what the Foundation wishes it said. For these reasons, we conclude that § 1605(a)(3) does not require that the foreign state against whom suit is brought be the foreign state that took the property at issue in violation of international law.[17]

B

The Foundation maintains that its activities in the United States are *de minimis*, and lack the requisite connection to the property in question. It submits that

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Moreover, as the Supreme Court recently explained, one of the two primary purposes described in § 1602 was "to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." *Samantar*, 130 S. Ct. at 2285; *see also id.* at 2291 n.19 ("The Department sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities."). Although we could have invited a statement of interest from the State Department, as the dissent suggests, Spain itself did not seek one and manifested no interest at oral argument in soliciting the Department's views.

[17] This comports with what happened in *Altmann*. While we did not directly decide the issue, we allowed the suit to go forward against Austria and the government-owned Austrian Gallery though it was alleged that the Klimt paintings at issue in that case had been confiscated in part by German Nazis. *See* 317 F.3d at 968.

the district court incorrectly held that the activity need not be "commercial" in the ordinary sense, or be related to the expropriated property, or be substantial.

[7] It is clear that activity need not be motivated by profit to be commercial for purposes of the FSIA. *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987). As § 1603(d) provides, the commercial character of an activity depends on its nature rather than its purpose. Thus, it does not matter that the Foundation's activities are undertaken on behalf of a non-profit museum to further its cultural mission. *See Sun v. Taiwan*, 201 F.3d 1105, 1107-08 (9th Cir. 2000) (holding that Taiwan's promotion and operation of a cultural tour was commercial activity despite being free and having been done to foster understanding). The important thing is that the actions are "the *type* of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (internal quotation marks omitted); *Siderman*, 965 F.2d at 708 ("The central question is 'whether the activity is of a kind in which a private party might engage.' " (quoting *Joseph*, 830 F.2d at 1024)).

[8] After allowing jurisdictional discovery on the issue, the district court found that the Foundation engages in commercial activities in the United States that include: buying books, posters, and post cards; purchasing books about Nazi expropriation of works of art; selling posters and books, and licensing reproductions of images; paying United States citizens to write for exhibit catalogs; shipping gift shop items to purchasers in the United States, including a poster of the Pissarro painting; recruiting writers and

speakers to provide services at the museum; permitting a program to be filmed at the museum that included the Pissarro painting and was shown on Iberia Airlines flights between Spain and the United States; placing advertisements in magazines distributed in the United States, and sending press releases, brochures, and general information to Spain's tourism offices in the United States, at least one of which mentions the Pissarro by name; distributing the museum bulletin, "Perspectives," to individuals in the United States; borrowing and loaning artworks, though not the painting; and maintaining a website through which United States citizens sign up for newsletters, view the collection — including the Pissarro painting — and purchase advance admission tickets through links to third-party vendors. *Cassirer*, 461 F. Supp. 2d at 1173-75. These findings are supported in the record and are not clearly erroneous.[18]

The Foundation faults the district court for having failed to require a nexus between the activity and the lawsuit, as well as a quantum of activity that has a substantial connection with the United States. It suggests that Congress meant to meld traditional concepts of personal jurisdiction with subject matter jurisdiction under the FSIA. However, the second

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[18] We have previously embraced a burden-shifting analysis under which the plaintiff has the initial burden of showing that an FSIA exception applies. If carried, the burden shifts to the defendant to show by a preponderance of the evidence that the exception does not apply. *See Siderman*, 965 F.2d at 707-08. The parties do not mention this framework, discuss its applicability to this part of the § 1603(a)(3) analysis, or argue that it affects the outcome in any way.

clause of § 1605(a)(3) contains no requirement that a lawsuit arise out of specific activity having to do with the property in the United States, that is, there is no express analogue to the traditional doctrine of specific jurisdiction, nor does it explicitly require any particular level of activity or conduct commensurate to that normally contemplated for general jurisdiction. In this, § 1605(a)(3) differs from the "commercial activity" exception in § 1605(a)(2), which does provide that a foreign state is not immune from jurisdiction where "the action is based upon a commercial activity carried on in the United States by the foreign state" or upon an act committed elsewhere that "causes a direct effect in the United States." *See, e.g., Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir. 1995) (applying § 1605(a)(2) and indicating the focus for purposes of the "commercial activity" exception is on specific acts that form the basis of the suit). The difference between the two exceptions shows that Congress knew how to draw upon traditional notions of personal jurisdiction when it wanted to, and did.[19] Beyond this, the statute says nothing particularly helpful about what constitutes "a" commercial activity that is either a "regular course of commercial conduct" or a "particular

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[19] The second clause of § 1605(a)(3) also differs from the first. The first clause, which pertains to commercial activities of the foreign state itself, requires that those activities be "carried on" in the United States. Section 1603(e) defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." The second clause, applicable here, relates to a "commercial activity" in which an instrumentality of a foreign state engages, and is subject to the broader definition of "commercial activity" in § 1603(d), which does not mention "substantial contact."

commercial transaction or act." Instead, Congress left it to the courts to flesh out on a case-by-case basis.

We have considered the question before. In *Siderman*, we concluded that the Sidermans' allegations concerning Argentina's solicitation and entertainment of American guests at an expropriated hotel and the hotel's acceptance of American credit cards and traveler's checks were sufficient at the jurisdictional stage to show that Argentina was engaged in a commercial activity in the United States. 965 F.2d at 712. In *Altmann*, we likewise held that the Gallery, which was an instrumentality of the Austrian government and owned the Klimt paintings allegedly confiscated from the plaintiff's family, engaged in a commercial activity in the United States. This was based on allegations (assumed to be true) that the Gallery authored, edited and published in the United States a book about the women in Klimt paintings and a guidebook with photographs of the stolen paintings; and it advertised Gallery exhibitions in this country. 317 F.3d at 969. The publication and sale of these materials, and marketing of a Klimt exhibition in the United States, were commercial activities in themselves, and also were a means of attracting Americans to the Gallery.

[9] Here, the Foundation has had many contacts with the United States, including some that encourage Americans to visit the museum where the Pissarro is featured, and some that relate to the painting itself. While the Foundation engaged in somewhat more activity in the United States than sufficed in *Siderman* and somewhat less than occurred in *Altmann*, we cannot say its endeavors fall short of being a

commercial activity for jurisdictional purposes under the second prong of § 1605(a)(3).

C

Spain proposes that Cassirer was required to exhaust judicial remedies available in Germany or Spain before suing in the United States under the expropriation exception.[20] It particularly objects to the district court's use of the *exclusio* unius doctrine to infer from the presence of an exhaustion requirement in § 1605(a)(7) — enacted in 1996 — but the absence of one in § 1605(a)(3) — enacted in 1976 — that Congress intended *not* to include an exhaustion requirement in § 1605(a)(3).[21] We recognize that extrapolating congressional intent for an earlier-enacted statute from a later-enacted statute is problematic. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (questioning whether the intent of an earlier Congress can be inferred from the views of a subsequent one). We do not do so here; rather, we rely on the plain language of § 1605(a)(3) which contains no exhaustion requirement. This was the district court's primary conclusion, and it is one with which we agree.

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[20] The Foundation makes no exhaustion argument, and does not join Spain's. Nor does the record disclose what remedies are available in either country.

[21] The requirement in former subsection (a)(7) was to arbitrate. Although not germane to our decision, we note that the arbitration requirement that was part of § 1605(a)(7) disappeared when that subsection was repealed, and reenacted in different form, in § 1605A. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)(iii), 122 Stat. 3, 341 (2008) (repealing 28 U.S.C. § 1605(a)(7)).

[10] "Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (internal citations omitted), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731, 739 (2001). The expropriation exception says nothing at all about exhaustion of remedies. It does not, for example, condition immunity on a claimant's having first presented his claim to the courts of the country being sued, or to the courts of the country that did the taking, or to any international tribunal. Spain identifies no language in the FSIA that would obligate Cassirer to exhaust. It follows that exhaustion is not a statutory prerequisite to jurisdiction.[22]

Neither does Spain point to anything in the legislative history that clearly indicates Congress meant to impose any such obligation. To the contrary, Congress intended to create a comprehensive, and exclusive, set of legal standards governing claims of immunity in every civil action against a foreign state.[23]

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[22] The Court of Appeals for the D.C. Circuit has expressed its belief that "this is likely correct." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 948 (D.C. Cir. 2008). In that case it was unnecessary to decide the issue definitively as the remedy Russia identified was inadequate in any event. However, the court did observe that "nothing in § 1605(a)(3) suggests that plaintiff must exhaust foreign remedies before bringing suit in the United States." *Id.*

[23] The Supreme Court has often emphasized the importance of the comprehensiveness of this scheme in interpreting the FSIA. *See, e.g., Verlinden*, 461 U.S. at 488 (noting that Congress passed the FSIA with "a comprehensive set of legal standards" to free the

As the preface to the House Report's section-by-section analysis indicates, the FSIA "sets forth the *sole and exclusive standards* to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R. Rep. No. 94-1487, at 12 (emphasis added). Further, the Report states, "[t]he purpose of the [FSIA] is to provide *when and how* parties can maintain a lawsuit against a foreign state . . . in the courts of the United States." *Id.* at 6 (emphasis added). These objectives would be undercut were courts to read requirements into the statute that Congress itself has not clearly prescribed.

Spain nevertheless commends us to the views on exhaustion in *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773, 782-84 (C.D. Cal. 1996);

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government from case-by-case diplomatic pressures; to clarify the governing standards; and to assure litigants that decisions are made on purely legal grounds); *Altmann*, 541 U.S. at 699 ("Quite obviously, Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged standards that the FSIA replaced." (internal quotation marks omitted)); *Weltover*, 504 U.S. at 610 (noting that the FSIA "establishes a comprehensive framework"); *Mesa v. California*, 489 U.S. 121, 136 (1989) (describing the FSIA as "a 'comprehensive scheme' comprising both pure jurisdictional provisions and federal law capable of supporting Art. III 'arising under' jurisdiction" (quoting *Verlinden*, 461 U.S. at 496)); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-38 (1989) (determining that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, even if provisions of another jurisdictional statute might apply, and referring to the House Report, which indicates that the primary purpose of the Act was to "set[ ] forth comprehensive rules governing sovereign immunity," H.R. Rep. 94-1487, at 12).

Millicom Int'l Cellular v. Republic of Costa Rica, 995 F. Supp. 14, 23 (D.D.C. 1998); and Justice Breyer's concurrence in *Altmann*, 541 U.S. at 714. We are not, however, persuaded they are apposite.

Greenpeace involved seizure of a ship, and held that the claimant could not complain that a taking or other economic injury has not been fairly compensated — and so violates international law — unless the claimant had first exhausted domestic remedies in the foreign state that allegedly caused the injury. *Millicom* involved anti-competitive activity but relied on *Greenpeace* for the same rule. Cassirer's jurisdictional theory is different, however; he asserts that the taking was in violation of international law because it was part of Germany's genocide against Jews.[24]

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[24] There can be no serious question this is a non-frivolous contention. *See, e.g.*, *Altmann*, 317 F.3d at 968 (assuming the facts as alleged were true, the Klimt paintings were "wrongfully and discriminatorily appropriated in violation of international law"); *see also Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (quoting State Department Press Release No. 296, April 27, 1949, entitled "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," that publishes an April 13, 1949, letter from Jack B. Tate, Acting Legal Advisor of the Department of State, reiterating the government's "opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls"; stating the government's "policy to undo the forced transfers"; and setting forth the policy of the executive branch with respect to claims asserted in the United States for restitution of such property, "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials").

Altmann is no more on point. The issue of exhaustion was not raised on appeal to our court and the Supreme Court did not grant certiorari on any issue other than whether the FSIA applied to claims that arose before it was enacted. The Court held that it did, rejecting the dissent's concern that doing so would open foreign nations to vast liability for expropriation claims that occurred long ago. Responding to the same concern, Justice Breyer mentions several principles that might prevent this from happening, among them, "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking."[25] 541 U.S. at 714. Justice Breyer's comment does not bear on the existence of mandatory statutory exhaustion for, as he says, an absence of remedies *may* need to be shown and a plaintiff who litigates in the United States in disregard of remedies in the expropriating nation "*may* have trouble showing a 'tak[ing] in violation of international law.' " *Id.* (quoting § 1605(a)(3)) (emphasis added). Thus, we do not read his

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[25] As in *Greenpeace* and *Millicom*, this observation also has to do with a taking unaccompanied by just compensation. Justice Breyer draws on substantive Fifth Amendment law as set out in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999), and *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984), which requires exhaustion of post-deprivation remedies because there cannot be constitutional injury until a state fails to provide just compensation. However, a taking may violate international law when it does not serve a public purpose or is discriminatory in nature — the kind of taking that Cassirer has pled for purposes of jurisdiction in this case — as well as when it is not accompanied by just compensation.

concurrence as intimating that § 1605(a)(3) statutorily *mandates* exhaustion for jurisdiction to lie.[26]

This brings us to *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc), which was rendered after the district court's decision in this case and in which we discussed whether prudential exhaustion should apply to claims under the Alien Tort Statute (ATS).[27] There, residents of Papua New Guinea alleged various crimes against humanity and environmental torts arising out of Rio Tinto's mining operations in Papua New Guinea. Recognizing that the Supreme Court had signaled in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), that a prudential or judicially-imposed exhaustion requirement "would certainly" be

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[26] Spain and Justice Breyer additionally allude to comment *f* of § 713 of the Restatement (Third), which states that "[u]nder international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged." Restatement (Third) § 713 cmt. *f*. On its face this section applies only to claims by one state against another where interests of comity are most compelling. Section 1605(a)(3), by contrast, applies to claims by an individual against a foreign state of which he is not a citizen. But even if applicable to claims other than those by one state against another, and even if imbedded in international law, this section merely reflects "ordinary" practice. The FSIA does not incorporate it, and the legislative history doesn't mention it. In short, this source does not clearly indicate that Congress meant to require exhaustion even though it did not say so.

[27] The ATS confers jurisdiction on United States courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

considered in an appropriate case under the ATS, we held that *Sarei* was such a case. However, neither *Sosa* nor *Sarei* offers any basis for reading a mandatory exhaustion requirement into § 1605(a)(3). Both the Supreme Court in *Sosa* and we in *Sarei* were discussing prudential, or discretionary, exhaustion, not statutory or mandatory exhaustion that may condition jurisdiction. Unlike statutory exhaustion, which, if clearly imposed by Congress, is mandatory and may also be jurisdictional, "[j]udicially-imposed or prudential exhaustion is not a prerequisite to the exercise of jurisdiction, but rather is 'one among related doctrines — including abstention, finality, and ripeness — that govern the timing of federal-court decisionmaking.' " *Sarei*, 550 F.3d at 828 (quoting *McCarthy*, 503 U.S. at 144).

For this reason, we do not consider whether exhaustion *may* apply to the claims asserted in this case. We have answered the question before us — whether Spain is entitled to sovereign immunity under the FSIA. Necessarily, to do so we had to decide whether exhaustion is a statutory prerequisite to jurisdiction. We have determined that it is not: the expropriation exception does not *mandate* exhaustion. The district court went no further, nor do we. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1088 (9th Cir. 2007) (deciding claim of tribal sovereign immunity on interlocutory appeal but declining to exercise jurisdiction over a claim based on denial of exhaustion of tribal remedies); *cf. Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 501 (1989) (rejecting immediate appeal from an interlocutory order denying a motion to dismiss based on a forum non conveniens clause because a claim that a party

may only be sued in a particular forum is vindicable on appeal after final judgment).

[11] In conclusion, § 1605(a)(3) does not require local remedies to be exhausted before a court may determine whether subject matter jurisdiction exists, i.e., whether a foreign state is immune from suit. As the statutory criteria are met, the expropriation exception applies to Spain. We express no opinion beyond this. Undoubtedly, Spain and the Foundation will pursue numerous defenses, but these are beyond the scope of our present jurisdiction. We simply hold that the district court has power to entertain Cassirer's claim against Spain as well as the Foundation.

IV

Conclusion

Having determined that our appellate jurisdiction does not extend to the district court's denial of motions to dismiss for lack of personal jurisdiction and a case or controversy, we dismiss the appeal as to these issues.

We conclude that Cassirer's suit falls within the "expropriation" exception to sovereign immunity, 28 U.S.C. § 1605(a)(3), which means that the courts of the United States have subject matter jurisdiction to entertain it. He has asserted a substantial and non-frivolous claim of a taking in violation of international law by Germany. We agree with the district court that Spain and the Foundation are not immune simply because neither was the taker. The Foundation, which claims to own the Pissarro that was

taken from Cassirer's grandmother, has engaged in various activities in the United States — some of which relate to the painting and encourage Americans to visit the museum — that show a commercial activity for purposes of § 1605(a)(3).

[12] We also hold that § 1605(a)(3) does not mandate exhaustion of remedies as a prerequisite to jurisdiction. We decline to consider at this stage of proceedings whether prudential exhaustion may be invoked to affect when a decision on the merits may be made. Accordingly, we affirm the district court's order denying motions by Spain and the Foundation to dismiss for lack of subject matter jurisdiction.

DISMISSED IN PART; AFFIRMED IN PART.

GOULD, Circuit Judge, with whom KOZINSKI, Chief Judge, joins, dissenting:

I would reverse and remand with instructions for the district court to dismiss, on the theory that the Foreign Sovereign Immunities Act ("FSIA"), under 28 U.S.C. § 1605(a)(3), has not waived the sovereign immunity of Spain or its instrumentality the Foundation. Hence I respectfully dissent. I have misgivings because the genocidal regime of Nazi Germany renders Cassirer, as an heir with purported rights to a Pissaro painting stolen by the Nazis, a most sympathetic claimant. And I dissent with trepidation because the vast majority of judges on this panel of eleven would not reverse outright on the view that the sovereign immunity of Spain and its Foundation has

not been waived by § 1605(a)(3) of the FSIA.[1] But two wrongs do not make a right, and, notwithstanding the Nazis' campaign of genocide against Jews and theft of their property, if Spain was not complicit in the Nazis' taking of the Pissaro,[2] I do not believe that our Congress would have intended its loss of sovereign immunity under the pertinent provision of the FSIA. Viewing § 1605(a)(3) as ambiguous, I conclude, all things considered, that it does not effectuate a waiver of sovereign immunity in this case as against Spain or the Foundation.

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[1] One might ask, when there is such a firm supermajority for a position, what is the value of a dissent? The answer is that I pen this dissent to explain my views, because a dissent is a matter of individual judicial statement and individual judicial conscience. The majority's opinion is reasonable, even persuasive, but only within the limits it sets by invoking the plain-meaning rule. If the language was as plain to me as the majority perceives it to be, I would adopt a similar view and shrug off a concern that Congress has blundered. However, I view the language as ambiguous and I view traditional modes of statutory interpretation as pointing in a different direction, for the reasons that follow. These views may be considered by the bench of another court, by the interested bar, or by other interested persons.

[2] Although Franco was somewhat ambivalent in conduct relating to Fascist Germany and Fascist Italy, perhaps because of their help in Spain's Civil War, Franco's regime in Spain never supported Nazi persecution of Jews and, instead, Spain was a safe haven for Jews fleeing Nazi Germany or occupied France. Indeed it has been estimated that Franco's policies during World War II saved the lives of tens of thousands of European Jews. Chaim U. Lipschitz, *Franco, Spain, the Jews, and the Holocaust* 4 (1984).

We start with the precise language of § 1605(a)(3):

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue . . . ."

28 U.S.C. § 1605(a)(3).

Where "the intent of Congress is clear and unambiguously expressed by the statutory language," no doubt the analysis ought to end there. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). The statute does not expressly say that the property must be taken "by the foreign state" (as Spain and the Foundation contend). But neither does the statute expressly say the property must be taken "by any foreign state" (as Cassirer contends). This lack of clarity is sufficient to conclude that the statute is ambiguous and subject to review of the legislative history for evidence of congressional intent. *See United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999); *see also Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part) ("The FSIA presents a peculiarly twisted exercise in statutory draftsmanship. . . . Congress chose to make the exceptions in sections 1605-07 purposefully ambiguous, having decided to put their faith in the U.S. Courts, and thus attempted to provide only very modest guidance to the judiciary." (internal punctuation omitted)). In my view, the district court, our prior panel, and now our en banc panel are

mistaken in their judgment thinking this statutory term unambiguous.

Prior to our en banc panel's decision today, it does not appear that any federal appellate court, apart from our prior panel whose opinion was taken en banc and is not precedent, has explicitly ruled on this issue. A few district-court decisions had previously agreed in approach with our prior panel's conclusion that the plain language does not require that the foreign-state defendant be the party that allegedly expropriated the property. These decisions, stressing the passive voice in § 1605(a)(3), as well as the prior panel opinion adopting this same line, are not persuasive to me. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202 (C.D. Cal. 2001), was conclusory. *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1109-10 (C.D. Cal. 2003), from the same district court, just cited it. Our prior panel's opinion was also summary in nature.

The en banc majority similarly concludes that the plain language of the statue decides this issue. Maj. op. at 11472-73. According to the majority, because the text of the statute is written in the passive voice, Congress would have to rewrite the statute to include the language "by the foreign state" in order to give it the meaning that Spain ascribes to it. *Id.* at 11473. Having decided that plain meaning dictates its result, the en banc majority then examines the legislative history but only to determine if it "clearly indicates that Congress meant something other than what it said." *Id.* at 11474 (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc)). That legislative history, according to the en banc majority, does not overcome the hurdle of plain

meaning, because it in part emphasizes that a sovereign state's commercial activities lie outside its otherwise sovereign immunity. *Id.* at 11476-78. Because I do not think the meaning of the text is so plain, as Congress would similarly have to rewrite the statute to include the language "by any foreign state" in order to give it the meaning that Cassirer ascribes to it, and because I view the legislative history as dictating another result, the "plain meaning" does not in my view set such a high hurdle for the legislative history to overcome.

Several voices that should command our attention, and more respect than is given by the majority, have stated the view that the waiver provision of § 1605(a)(3) applies to the state that has wrongfully expropriated property in violation of international law. The Fifth Circuit, for example, has said that "the legislative history of the FSIA indicates that section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of the state." *Vencedora Oceanica*, 730 F.2d at 204. The D.C. Circuit has also recently said that § 1605(a)(3) "effectively requir[es] that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 941 (D.C. Cir. 2008). Although these statements might be viewed as in the nature of dicta because the issue that we face was not squarely confronted, I do not view these statements as misleading dicta; rather, they point us in the correct direction. This is the view

presented in the American Law Institute's language in the *Restatement*, which also supports the interpretation that the defendant must be the foreign state that allegedly expropriated the property. Here is the *Restatement* of the ALI:

> [T]he FSIA provides that if the property was *taken by the foreign state* in violation of international law, and if the property is . . . owned or operated by an instrumentality *of the foreign state* that is engaged in commercial activity in the United States, there is a sufficient basis for jurisdiction to adjudicate claims to the property.

Restatement (Third) of Foreign Relations Law of the United States § 455 cmt. c (1987) (emphasis added).

I do not need to reach the proposed rationales that would turn decision on exhaustion.[3] Instead, we must first focus on whether Spain and the Foundation have taken property in violation of international law. Given that the statute is ambiguous, I would apply the usual tools of statutory construction and conclude that

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[3] If, contrary to my position, it were definitively decided that subject matter jurisdiction exists under the FSIA in so far as § 1605(a)(3) permits proceeding against any sovereign despite that the property was taken in violation of international law by a different sovereign, then I would conclude that exhaustion would be required by the statute, under § 1605(a)(3), as part and parcel of determining whether there had a been a taking in violation of international law. In this sense a requirement of exhaustion is embedded within the statute's exception for takings in violation of international law. However, believing that a waiver of sovereign immunity arises only as against a sovereign that took property in violation of international law, I do not have to reach this position.

§ 1605(a)(3) means that the property at issue must be taken in violation of international law by the foreign state defendant whose sovereign immunity shall be lost.

Considering the legislative history, the following points support my interpretation and that of the Fifth Circuit and D.C. Circuit in their dicta and the Restatement position: The FSIA incorporates the concepts of the "Hickenlooper Amendment," which provided in pertinent part that disputes over expropriated property were justiciable when rights in property were asserted on the basis of a taking "*by an act of that state* in violation of the principles of international law." *See* 28 U.S.C. § 2370(e)(2) (1982) (emphasis added); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985) ("Section 1605(a)(3) of the FSIA . . . parallels the so-called 'Hickenlooper Exception' to the act of state doctrine . . . . Like the Hickenlooper Exception, Section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality *that has nationalized or expropriated property without compensation*, or that is using expropriated property taken by another branch of the state." (quotation marks omitted and emphasis added)).

"Congress intended the FSIA to be consistent with international law . . . ." *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d 493, 497-98 (9th Cir. 1992). The central premise of the FSIA is that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law." H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in*

1976 U.S.C.C.A.N. 6604, 6613. Section 1605(a)(3) "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West v. Multibanco Comermex, S.A.*, 807 F.3d 820, 826 (9th Cir. 1987). When customary international law concludes that an act by a foreign state, that is, the taking of property in violation of international law, is no longer a sovereign act, the foreign state is no longer entitled to sovereign immunity. International law therefore supports the exercise of jurisdiction over foreign states that have themselves taken property in violation of international law; it does not support the exercise of jurisdiction over sovereign entities that have legitimately acquired property that was at some other time and by some other foreign state taken in violation of international law. To conclude otherwise would provide U.S. courts with unbridled jurisdiction over any sovereign foreign state that has in its possession property that was at one time taken in violation of international law by another foreign state. It would not matter if the expropriation occurred seventy years ago, as in this case, or seven hundred years ago. Congress would not have intended such a result.

The productive inquiry here is to ask what Congress intended by § 1605(a)(3), or, some might say, what Congress would have intended if the case presented had been expressly considered.[4] Because I

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[4] Benjamin Cardozo in *The Nature of the Judicial Process* states:

> The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and

do not believe that Congress would have intended Spain to suffer loss of its sovereign immunity by this provision if it had no complicity in the unlawful taking, I do not join the position of the majority.[5]

Also, the majority takes no heed of the fact that there may be important diplomatic implications of its decision. Rather than asking the United States

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> Sources of the Law," "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

Benjamin N. Cardozo, *The Nature of the Judicial Process* 15 (Bibliolife 2009) (1921) (internal footnote omitted). A similar idea is expressed by Sir William Blackstone in his esteemed *Commentaries on the Laws of England*, where, in discussing "equity," he states:

> For, since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed."

William Blackstone, 1 *Commentaries on the Laws of England* 61 (1765).

[5] Congress, of course, could amend its language in § 1605(a)(3) to be explicit about whether it means to waive sovereign immunity of an innocent nation like Spain when it is in possession of a property taken by some other person or nation in violation of international law.

Department of Justice and United States Department of State to weigh in on the question whether the majority's statutory interpretation has diplomatic implications for the United States, the majority rushes headlong to give a procedural remedy to Cassirer. As I've said at the outset, Cassirer is a sympathetic claimant, being a victim of Nazi theft, yet that in itself is not sufficient to warrant a United States—led World Court approach, as the majority's position permits. U.S. foreign policy has rebuffed such a position, as the United States withdrew, with limited exceptions, from the International Court of Justice in 1986 and has not joined the International Criminal Court, which was founded in 2002. Sean D. Murphy, *Principles of International Law* 135 (2006); Jennifer Elsea, Congressional Research Service, Report for Congress, *U.S. Policy Regarding the International Criminal Court* 2 (Aug. 29, 2006).

The majority's view is not prudent unless sanctioned by the Department of State, and may be not prudent even if it had the State Department's approval.[6] There is no showing of any manifest need in justice to give Cassirer a forum in the United States for a free shot against Spain, for absent any prior attempt at exhaustion of remedies in Spanish courts,

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[6] The record does not show any statement of position on proper scope of § 1605(a)(3) to our court from the United States Department of Justice or the United States Department of State. I am not able to discern if the State Department is merely slumbering through this matter, or if, for its own purposes, it is studiously avoiding comment and maintaining a conscious silence at this stage of the case. However, in fairness to the State Department, and the Department of Justice, our court has not heretofore invited their comment on this issue.

there is no showing that he would meet with a sovereign immunity barrier there.

Further, other maxims of statutory interpretation are persuasive contrary to the majority's interpretation. First, because there is ambiguity in interpretation, we should not adopt an interpretation that would violate the Constitution. *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (en banc) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality. . . . [I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." (citations omitted)). Here, Cassirer's due is to get the painting stolen by the Nazis or compensation for it. But Spain's due is to have its sovereignty and sovereign immunity respected because, as I first noted, two wrongs don't make a right. We should conclude that to strip Spain of its immunity because of a Nazi wrongdoing is a due process violation, because Spain is losing the sovereignty due to it with no showing or even allegation of complicity in wrong. In suggesting that there is a due process problem in the court's interpretation, I am seeing a procedural problem. As a matter of procedural due process, it is hard to see how we could suggest rationally that Spain should have to answer questions about whether Nazi Germany's taking of the painting, so many decades ago, offended international law. I am at a loss to understand how Spain could be expected to have any first-hand knowledge of what Nazi Germany did and why. Spain of course is aware of the general course of Nazi persecution of Jews, from the Nuremberg War Trials,

but how can we say that Spain has any first-hand knowledge of Nazi Germany's taking of the Pissaro painting at issue here? If the majority interprets its jurisdictional grant under § 1605(a)(3) to be invoked when there is unconstitutional action of any person taking a property, no matter what country, no matter when, this puts an unreasonable procedural burden on a nation like Spain without knowledge of the events creating jurisdiction, and I think that is a procedural due process problem.

Second, it has long been understood that statutes should not be construed to violate the law of nations if any other interpretation is possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). As stated by Chief Justice Marshall in that case:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

Id. at 118. It is my position that saying a taking by Nazi Germany in violation of international law waives the sovereign immunity of some innocent nation that comes upon the property later through legitimate means is a position that would not be accepted under international law.[7] *See Restatement (Second) of*

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[7] The majority contends that it is "premature" to consider whether Spain is a good faith purchaser. Maj. op. at 11478 n.15. Yet we

Foreign Relations Law of the United States § 164 (1965) ("A state is responsible under international law for injury to an alien caused by conduct *subject to its jurisdiction*, that is *attributable to the state* and wrongful under international law." (emphasis added); *id.* § 183 (explaining that a state is responsible under international law for injury to the property of an alien caused by conduct that is itself not attributable to the state if the injury resulted from the state not taking reasonable measures to prevent the conduct causing the injury or not reasonably attempting to impose a penalty on the person responsible for the conduct); *Restatement (Third) of Foreign Relations Law of the United States* § 207 ("A state is responsible for any violation of *its* obligations under international law

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must consider whether Congress intended to waive the sovereign immunity of such a good faith purchaser, since Cassirer does not allege in the complaint that Spain acquired the painting in bad faith or in violation of international law. Cassirer alleges at most that Spain has "wrongfully detained" the painting after the Nazis took the painting in violation of international law. Nor are we to rely simply on the allegations in the complaint to determine subject matter jurisdiction. We must instead look to facts outside the pleadings to determine whether we have jurisdiction. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) ("No presumptive truthfulness attaches to plaintiff's allegations. Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence.") (citations omitted); *see also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."); Charles Alan Wright & Arthur R. Miller, 5B *Federal Practice and Procedure* § 1350 (3d ed. 2004). We know of no such facts in the record showing that Spain has itself taken the painting in violation of international law.

. . . ." (emphasis added)); *id.* § 712 ("A state is responsible under international law for injury resulting from . . . a taking *by the state* of the property of a national of another state . . . ." (emphasis added)). As we stated recently in *Serra v. Lappin*, the principle from *The Schooner Charming Betsy* is only a tool to aid our search for congressional intent, because Congress, if it wanted to do so, could legislate beyond the limits of international law. 600 F.3d 1191, 1198 (9th Cir. 2010). As we explained in *Cabrera-Alvarez v. Gonzales*, "Congress has the power to legislate beyond the limits posed by international law." 423 F.3d 1006, 1009 (9th Cir. 2010) (quotation marks omitted). The question is, in enacting § 1605(a)(3), did Congress mean to so infringe international law in its very provision finding violation of international law a basis for waiver of sovereign immunity?

There is still another principle of statutory construction that is applicable here. Specifically, we have sometimes recognized that statutes in derogation of the common law are to be strictly construed. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident"); *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 371 (9th Cir. 1974) ("Any such rule of law, being in derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law, farther than its words import." (quotation marks omitted)). We can say that the common law gives sovereign nations like Spain a sovereign immunity. The United States Supreme Court recently recognized this in *Samantar v. Yousuf*,

where it stated, "The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." 560 U.S. ___, No. 08-1555, slip op. at 4 (2010) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). When the FSIA establishes a comprehensive system for finding exceptions to sovereign immunity in its specified categories, thus outlining when sovereign immunity should be considered to have been waived permitting suit against foreign nations in the United States, these statutory exceptions to sovereign immunity, being in derogation of common law, must be strictly construed, not expansively construed. If we give a strict construction to § 1605(a)(3), I think we logically would say that it is intended to cover violations of international law by the nation whose sovereignty is waived. But the majority, saying it covers violations of international law by anyone, is giving this provision, in derogation of the common law concept of sovereign immunity, an expansively unreasonable construction.

History and reason and comity all are allied in supporting that in this case Spain's sovereignty should be respected.

History tells us that nations have a sovereign immunity that has been broadly respected by other countries in their legal systems and in the system of international law. *See* Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 Harv. Hum. Rts. J. 105, 109-10 (2008) ("State sovereignty and sovereign immunity fall into the category of customary international law . . . . [S]tates will generally accord other states immunity out of the belief that this is an unwritten but obligatory

international rule."); Charles S. Rhyne, *International Law* 80 (1971) ("Corollary to a state's right of independence and equality is its immunity from suit in foreign courts by foreign nationals. . . . In most states, this immunity from suit remains an absolute privilege."); *see also Verlinden*, 461 U.S. at 486-88 ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country. [Even under the FSIA, a] foreign state is normally immune from the jurisdiction of federal and state courts . . . subject to a set of exceptions . . . .").

Reason tells us that § 1605(a)(3) should here be interpreted in a way that respects Spain's sovereign immunity. First and foremost, reason tells us that two wrongs don't make a right, so a Nazi taking in violation of international law cannot reasonably be viewed as invoking waiver of sovereign immunity by a Spain that was not complicit in the taking. The language of the statute is ambiguous on its face, it does not say a taking by the foreign state, it does not say a taking by any one. Several important principles of statutory construction, that we shouldn't interpret this statute in a way violating our Constitution's Due Process Clause, that we shouldn't interpret this statute in a way violating international law, and that we should give strict construction to waivers of sovereign immunity because they are in derogation of common law, all support a more modest interpretation of § 1605(a)(3) than that advanced by the majority.

The principle of comity tells us the same thing. "Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Dependable Highway*

Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1067 (9th Cir. 2007) (quotation marks omitted). Thus it seems to me that because Spain is a sovereign with immunity from suit, we should respect that unless we have better reason than merely a deserving victim of Nazi aggression. Equally important, and I think a part of comity, is the common sense notion of the golden rule. We should not do to other nations what we would not want other nations to do to us. I am concerned that by indulging now the sympathetic claim of Cassirer as a Jewish heir with entitlement to priceless art stolen by Nazi Germany, but doing so at the cost of fairness to Spain and disrespect of its sovereignty, we will likely sow the seeds of maltreatment of the United States and its officials in foreign courts.

Hence, I respectfully dissent.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 8, 2009]

No. 06-56325
D.C. No. CV-05-03459-GAF

CLAUDE CASSIRER,
Plaintiff-Appellee,

v.

KINGDOM OF SPAIN,
a foreign state,
Defendant,

and

THYSSEN-BORNEMISZA
COLLECTION FOUNDATION,
an agency or instrumentality
of the Kingdom of Spain,
Defendant-Appellant.

No. 06-56406
D.C. No. CV-05-03459-GAF

CLAUDE CASSIRER,

Plaintiff-Appellee,

v.

KINGDOM OF SPAIN,
a foreign state,
Defendant-Appellee,

and

THYSSEN-BORNEMISZA
COLLECTION FOUNDATION,
an agency or instrumentality
of the Kingdom of Spain,
Defendant.

OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued September 24, 2007
Submitted September 8, 2009
Pasadena, California

Filed September 8, 2009

Before: Thomas G. Nelson, Sandra S. Ikuta, and
Randy Smith, Circuit Judges.

Opinion by Judge N.R. Smith;
Partial Concurrence and Partial Dissent
by Judge Ikuta

COUNSEL

William M. Barron of Alston & Bird, LLP, New York City, New York; Anthony A. De Corso of Beck, De Corso, Daly, Kreindler & Harris, for defendant-appellant the Kingdom of Spain.

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Stuart R. Dunwoody of Davis Wright Tremaine, LLP, Los Angeles, California, for plaintiff-appellee Claude Cassirer.

OPINION

N.R. SMITH, Circuit Judge:

Claude Cassirer ("Cassirer") filed this action in federal district court against the Kingdom of Spain ("Spain") and the Thyssen-Bornemisza Collection Foundation (the "Foundation")[1] to recover a Camille Pissarro painting now on display at the Foundation's museum in Madrid, Spain. Cassirer alleges that the painting was taken from his grandmother in violation of international law in 1939 by an agent of the government of Nazi Germany. On appeal, Appellants challenge the district court's denial of their respective

[1] When referred to collectively, Spain and the Foundation are referred to as "Appellants."

motions to dismiss for lack of (1) personal jurisdiction, (2) standing, (3) a justiciable case or controversy, and (4) subject matter jurisdiction based on sovereign immunity.

We dismiss this appeal with regard to Appellants' challenges to personal jurisdiction, standing, and the existence of a justiciable case or controversy. We lack appellate jurisdiction because there has been no final judgment and these issues are not immediately appealable under the collateral order doctrine.

However, under the collateral order doctrine, we have jurisdiction to consider the issue of sovereign immunity. *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763, 764 n.6 (9th Cir. 2007). We consider for the first time whether the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3), applies when the foreign state (against whom a claim is made) is not the entity that expropriated the property in violation of international law. We hold that it does. We also hold that advertising and promotional activity, purchase and sale of goods and services, and the exchange of artwork with persons and entities, all within the United States, are sufficient to constitute "commercial activity in the United States" under § 1605(a)(3). Finally, based on guidance in our recent decision in *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832 (9th Cir. 2008) (en banc) (plurality opinion), we remand to the district court to determine, in the first instance, whether the circumstances of this case warrant judicial imposition of an exhaustion requirement.

I. Background.

For the purposes of this appeal, we take the factual allegations in this case as true.[2] At the heart of the present dispute is the *Rue Saint-Honoré, après-midi, effet de pluie* (the "Painting"), an oil painting by the French impressionist master Camille Pissarro. The Painting was originally purchased in 1898 by Cassirer's great-grandfather, Julius Cassirer, a member of a wealthy Jewish family living in Germany. The Painting remained in the family for the next forty years. First passing upon Julius's death to his son, Fritz, and later to Fritz's widow, Lilly Cassirer.

In 1939, as persecution of Jews living in Nazi Germany increased, Lilly and her new husband sought official permission to leave Germany and take their possessions, which included the Painting. Before granting permission, the Nazi government appointed Munich art dealer Jakob Scheidwimmer as the official appraiser to evaluate the works of art that Lilly wished to take with her. After his appraisal, Scheidwimmer refused to allow Lilly to take the Painting out of Germany and demanded that she sell it to him for approximately $360. Because she feared she would not be allowed to leave Germany, she

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[2] In reviewing the district court's denial of a motion to dismiss, we accept all well-pleaded factual allegations in the complaint as true, *Altmann v. Republic of Austria*, 317 F.3d 954, 962 (9th Cir. 2002) (citing *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001)), *amended by* 327 F.3d 1246 (9th Cir. 2003), *aff'd by* 541 U.S. 677 (2004), and determine whether the factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

relinquished the Painting, knowing that she would never receive the funds she was promised.[3]

Scheidwimmer traded the Painting to another art dealer who, also persecuted by the Nazis, fled Germany and took the Painting to Holland. After Germany invaded Holland, the Gestapo confiscated the Painting and returned it to Germany, where it was sold at auction to an anonymous purchaser in 1943. The Painting surfaced at a New York gallery in 1952 and was then sold to a private collector in St. Louis. It was sold again in 1976 to an unknown dealer, who subsequently sold it to Baron Hans-Heinrich Thyssen-Bornemisza (the "Baron"), a resident of Switzerland and one of the world's foremost private art collectors.

In 1988, Spain paid the Baron $50 million to lease his collection for ten years. Five years into the lease, Spain paid the Foundation approximately $327 million to purchase the Baron's entire collection, including the Painting. Under the terms of the purchase, Spain provided the Foundation a palace in Madrid, free of charge, for use as the Thyssen-Bornemisza Museum (the "Museum"). In addition, the purchase agreement requires that the collection be exhibited at the Museum in Spain and sets limits regarding loans to other art institutions. If the collection is not used in accordance with the purchase agreement or if the

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[3] Lilly's sister, who remained in Germany, was later imprisoned in the Theresienstadt extermination camp, where she was subsequently killed. Lilly died in 1962, never having recovered the Painting or learned of its whereabouts.

Foundation ceases to exist, Spain will become the owner of the collection.[4]

In 2000, Claude Cassirer,[5] the grandson and heir of Lilly Cassirer, discovered that the Painting was on display in Madrid at the Museum. He petitioned Spain's Minister for Education, Culture and Sports (who was also chair of the Foundation's Board), requesting the return of the Painting. His request was denied. In July 2003, five United States Congressmen wrote to the Minister, again requesting that Appellants return the Painting to Cassirer. The request was again denied. Cassirer never attempted to obtain the Painting through judicial proceedings in Spain.

On May 10, 2005, Cassirer filed suit against the Foundation and Spain in the Central District of California. On February 28, 2006, the Foundation filed a motion to dismiss, contending that the district court lacked subject matter and personal jurisdiction and that venue did not lie in the Central District of California. While the Foundation's motion was pending, Cassirer moved the court for leave to conduct jurisdictional discovery.

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[4] Under Spanish law, at least two-thirds of the Foundation's Board of Directors must be representatives of Spain, who are nominated and removed freely by the Spanish government through royal decree. Currently, Spain's Minister of Culture, Secretary of State for Culture, Secretary of State for Budget and Expenses, and Undersecretary of Culture all sit as *ex officio* members of the Foundation's Board.

[5] Claude Cassirer is a United States citizen and resident of California.

On April 5, 2006, the district court reviewed, as a question of law, whether the expropriation exception to sovereign immunity in § 1605(a)(3) of the FSIA applied to a sovereign entity that was not alleged to have taken property in violation of international law. After receiving further briefing from the parties, the district court ruled that § 1605(a)(3) requires only that property was seized in violation of international law, not that the foreign sovereign itself violated international law. The district court also granted sixty days to conduct discovery for the purpose of determining whether the Foundation conducted "commercial activity in the United States within the meaning of the FSIA."

On June 9, 2006, Spain filed its own motion to dismiss, contending lack of subject matter jurisdiction due to sovereign immunity and various other grounds. On August 30, 2006, after hearing argument, the district court issued a Memorandum and Order denying both the motions to dismiss. The district court held that 1) Cassirer presented a case or controversy against both the Foundation and Spain; 2) Cassirer was not required to exhaust judicial remedies; 3) § 1605(a)(3) of the FSIA applies to the Foundation and Spain, despite Cassirer's admission that neither took the Painting in violation of international law (affirming its earlier decision on this point); 4) the Foundation and Spain engage in commercial activity in the United States within the meaning of § 1605(a)(3), such that they are not entitled to sovereign immunity; 5) under the language of the FSIA, personal jurisdiction exists over the Foundation and Spain by virtue of the fact that subject matter jurisdiction existed; and 6) venue is proper in the

Central District of California. *See Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006).

The Appellants brought this timely interlocutory appeal. Cassirer subsequently filed a Motion to Dismiss, contending that this court lacks appellate jurisdiction over any issues other than whether the Appellants are entitled to sovereign immunity.

II. Jurisdiction.

We first address the issue of appellate jurisdiction raised by Cassirer. We have jurisdiction to review "final decisions" of the district court. 28 U.S.C. § 1291. "Final decisions end the litigation on the merits and leave nothing for the court to do but execute the judgment." *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003) (internal quotations and alterations omitted). Typically, a district court's denial of a motion to dismiss is not final for purposes of 28 U.S.C. § 1291. *See Marx v. Government of Guam*, 866 F.2d 294, 296 (9th Cir. 1989). Under the "collateral order doctrine," we may nonetheless review that "small category of decisions" that are "conclusive [because they] resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (citation omitted).

[1] "[T]he denial of a claim of lack of [personal] jurisdiction is not an immediately appealable collateral order." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988); *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003) (orders denying motions to dismiss for lack of personal jurisdiction are not final and are not

appealable under the collateral order doctrine). Therefore, we do not have jurisdiction to review the district court's denial of Appellants' motions to dismiss for lack of personal jurisdiction, and we dismiss this appeal with regard to that issue.

[2] Likewise, we dismiss the appeal with regard to the issues of standing and Article III case or controversy. The district court's order denying Appellants' motion to dismiss on these issues is fully reviewable on appeal from a final judgment. Therefore, we hold that such a denial is not immediately appealable as a collateral order.[6] *See Swint*, 514 U.S. at 42 (to be immediately appealable under collateral order doctrine, decision must be effectively unreviewable on appeal from the final judgment in the underlying action).[7]

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[6] *See also, e.g., Moniz v. City of Ft. Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998) (question of standing is not a final decision under the collateral order doctrine); *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993) (denial of a motion to dismiss for lack of standing does not qualify as a final judgment and is not immediately appealable); *Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1484 (11th Cir. 1991) (observing that denial of motion to dismiss on ripeness grounds is not immediately appealable); *Shanks v. City of Dallas*, 752 F.2d 1092, 1099 n.9 (5th Cir. 1985) (case or controversy considerations are not appealable under the collateral order exception because they obviously "involve considerations that are emeshed in the legal issues surrounding [the merits of the] cause of action"); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 474-75 (2d Cir. 1974) (question of ripeness and standing are not immediately appealable under collateral order doctrine), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

[7] In *Swint*, the Supreme Court left open the possibility that we might exercise pendent appellate jurisdiction when we properly

We have jurisdiction to review the district court's order as it pertains to sovereign immunity. "[A]n order denying immunity under the FSIA is appealable under the collateral order doctrine," because sovereign immunity is immunity from suit, which is effectively lost if a case is erroneously permitted to go to trial. *Gupta*, 487 F.3d at 763, 764 n.6.

III. Sovereign Immunity Under the FSIA.

The primary issue before us is whether Appellants are entitled to sovereign immunity under the FSIA, such that the district court lacks subject matter jurisdiction. The existence of subject matter jurisdiction under the FSIA is a question of law reviewed de novo. *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 723 (9th Cir. 1997). A district court's

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have jurisdiction over one ruling and "related rulings that are not themselves independently appealable" are "inextricably intertwined," or when review of the related ruling is "necessary to ensure meaningful review of the [issue over which the court has jurisdiction]," *Swint*, 514 U.S. at 50-51, and we have done so under some circumstances. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002); *Hook v. Ariz. Dep't of Corr.*, 107 F.3d 1397, 1401-02 (9th Cir. 1997). We decline to do so here, however. Whether Appellants are "persons" within the meaning of the Due Process Clause for purposes of personal jurisdiction is not inextricably intertwined with our determination of sovereign immunity. Likewise, whether the case involves a case or controversy against Spain does not relate to or necessarily involve our consideration of sovereign immunity. Further, because we can resolve the sovereign immunity issue without reaching the merits of Appellants' challenge to Article III case or controversy and standing, we do not exercise pendent appellate jurisdiction under Swint. Accordingly, we dismiss this appeal as to these issues.

factual findings on jurisdictional issues are reviewed for clear error. *Id.*

A. The FSIA Provides Limited Exceptions to Sovereign Immunity.

[3] The district court has original jurisdiction of any nonjury civil action against a foreign state, including its agencies and instrumentalities.[8] *See* 28 U.S.C. § 1330(a). Under the FSIA, however, foreign states are immune from the jurisdiction of United States courts, subject only to the specific exceptions in §§ 1605, 1607, and specified existing international agreements. *See id.* at § 1604.[9] Thus, the sole basis for obtaining jurisdiction over a foreign state in federal court is the existence of an exception to the FSIA. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The FSIA exceptions include "waiver of immunity, § 1605(a)(1), commercial activities occurring in the United States or causing a direct effect in this country, § 1605(a)(2), property expropriated in violation of international law, § 1605(a)(3), inherited, gift, or immovable property located in the United States, § 1605(a)(4),

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[8] Section 1603(a) defines "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . ."

[9] Section 1604 provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604.

non-commercial torts occurring in the United States, § 1605(a)(5), and maritime liens, § 1605(b)." *Id.*

B. The Expropriation Exception.

[4] Cassirer contends that neither the Foundation nor Spain is entitled to sovereign immunity due to the "expropriation exception" of § 1605(a)(3).[10] Section 1605(a)(3) provides that a "foreign state shall not be immune . . . in any case . . . in which rights in property taken in violation of international law are in issue . . . ." The issue regarding the applicability of this exception arises because the statute uses the passive voice and does not expressly require that the foreign state (against whom the claim is made) be the entity that took the property in violation of international law. Appellants invite us to read such a requirement into the statute. The parties agree that Germany, and not Spain, allegedly took the Painting in violation of international law. Therefore, under the construction urged by Appellants, the expropriation exception could not apply. We disagree.

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[10] Section 1605(a)(3) provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

[5] We find § 1605(a)(3) to be unambiguous. Where "the intent of Congress is clear and unambiguously expressed by the statutory language," that is normally the end of the statutory analysis. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). We hold that the plain language of § 1605(a)(3) does not require that the foreign state (against whom the claim is made) be the entity who expropriated the property in violation of international law.

[6] Our holding is consistent with the legislative history.[11] In reviewing Congress's intent in enacting the FSIA, we consider § 1602, which sets forth Congress's findings and purpose. This section expresses Congress's understanding that foreign states are not immune from suit "insofar as their commercial activities are concerned."[12] In explaining § 1602, the

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[11] Under appropriate circumstances, we may consider legislative history even when the plain language is clear. We do this, however, only where the legislative history "*clearly* indicates that Congress meant something other than what it said." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (emphasis added).

[12] In its statement of "Findings and declaration of purpose," 28 U.S.C. § 1602 provides:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their

House Report states that Congress is adopting the restrictive theory of sovereign immunity, that is, "[T]he sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

[7] Consistent with the restrictive theory of sovereign immunity described in § 1602 and the House Report, the exceptions in § 1605(a) apply to situations in which foreign states act more like private persons or are engaged in commercial activities. The plain language of § 1605(a)(3) is entirely consistent with Congress's intent, because § 1605(a)(3) gives a court jurisdiction over a foreign state in cases involving stolen property only if the foreign state (or its agency) is engaged in a commercial activity in the United States.

Citing *In re Republic of Philippines*, 309 F.3d 1143 (9th Cir. 2002), Appellants argue that § 1605(a)(3) applies only when the foreign state against whom the claim is leveled actually took property in violation of international law. *Republic of Philippines* required us to interpret the exception in § 1605(a)(4), which provides that a foreign state loses its immunity in any case "in which rights in property in the United States

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commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

acquired by succession or gift or rights in immovable property situated in the United States are in issue." We construed the statute as applying only to rights in property in the United States acquired by succession or gift *by the foreign state*. In reaching this conclusion, we relied on language in the House Report which stated:

> There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought . . . The reason is that, in claiming rights in a decedent's estate or obtained by gift, *the foreign state claims the same right which is enjoyed by private persons*.

Republic of Philippines, 309 F.3d at 1151 (quoting H.R. Rep. No. 94-1487) (emphasis added). In other words, to effectuate Congress's intent to grant courts jurisdiction over foreign states only when they act more like private persons, we read "by the foreign state" into § 1605(a)(4). Under this reading, courts gain jurisdiction over a foreign state only if the state acted like a private person and by claiming rights in a decedent's estate or obtaining a gift. Contrary to Appellant's argument, our interpretation of § 1605(a)(4) in *Republic of Philippines* is entirely consistent with a plain language reading of § 1605(a)(3). It is not necessary to read "by the foreign state" into § 1605(a)(3) to achieve consistency with the restrictive theory of sovereign immunity. The plain language of § 1605(a)(3) already grants courts jurisdiction over foreign states only if they act like a private person by engaging in commercial activities.

Republic of Philippines therefore provides no justification to depart from the plain language of § 1605(a)(3).

[8] Because nothing in the plain language of the FSIA or the legislative history requires us to read additional language into the statute, we hold that the expropriation exception to sovereign immunity found in § 1605(a)(3) does not require that the foreign state against whom the claim is made be the foreign state that took property in violation of international law.

C. Commercial Activity in the United States.

[9] For the expropriation exception to apply, the FSIA also requires "that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The Foundation admits that it is an "agency or instrumentality" of Spain and that it owns the Painting. We agree with the district court that the Foundation has engaged in sufficient commercial activity in the United States to satisfy § 1605(a)(3).

As defined in the FSIA, "commercial activity"

> means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). "The central question is whether the activity is of a kind in which a private party might engage." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992) (internal quotation marks omitted).

In *Siderman*, we concluded that Argentina conducted commercial activity in the United States, because (1) it advertised an expropriated hotel in the United States; (2) it solicited guests through its United States agent (Argentina's national airline); (3) numerous Americans stayed at the hotel; and (4) the hotel accepted all major American credit cards. *Id.* at 712-13.

Likewise, in *Altmann*, we concluded that authoring, promoting, and distributing books and other publications in the United States to exploit expropriated paintings were "sufficient to constitute 'commercial activity' for the purpose of satisfying the FSIA." *Altmann*, 317 F.3d at 959.

In this case, after allowing limited jurisdictional discovery, the district court found that the Foundation engaged in commercial transactions in the United States, including transacting business as a purchaser and a seller of goods and services and as an advertiser in distributing marketing and other commercial promotional materials. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1173-75 (C.D. Cal. 2006). For example, the Foundation made numerous purchases of books, posters, post cards, and related materials from United States businesses in New York, California, and Washington, D.C. The Foundation also purchased

books about Nazi expropriation of great works of art[13] and a book presumably about the works of Pissaro. *Id.* at 1173. The Foundation sold posters and books to United States residents and businesses, and licensed the reproduction of images to various United States businesses. *Id.* The Foundation also admitted that it worked with U.S. entities to secure goods to be sold in the Museum gift shop, including paying U.S. citizens to write for its exhibit catalogs. *Id.* Further, it admitted that it has shipped gift shop items to purchasers in the United States. *Id.* Notably, the Foundation sold a poster of the Painting at issue in this case to individuals in both California and North Carolina. The California purchaser resides in the Central District of California and used her American Express credit card to consummate the transaction. *Id.*

The Foundation also solicited, recruited, and commissioned writers and speakers from the United States to provide services at the Museum. *Id.* The Foundation facilitated the production of a film on the Foundation collection, featuring the Painting, which it knew would be presented in-flight on Iberia Airlines flights to and from the United States. *Id.* at 1174.

The Foundation placed advertisements in magazines that are distributed in the United States and sent press releases, brochures, and general

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[13] The district court noted, "As particularly ironic examples, the Foundation purchased through Amazon.com *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, . . . and from the American Association of Museums in Washington, DC purchased a volume on *Museum Policy and Procedure for Nazi Era Issues*." *Cassirer*, 461 F. Supp. 2d at 1173 (internal citations omitted).

information to TourEspaña and the Spanish National Tourist Offices in the United States. For example, the Foundation advertised in news publications such as *Newsweek*, *Time Magazine*, and the *New Yorker*. *Id.* It also distributes its Museum bulletin, "Perspectives," to individuals in the United States, including two in the Central District of California. *Id.*

The Foundation also contracted with museums in the United States to loan its artwork to the U.S. institutions or to borrow artwork for display in the Foundation Museum in Spain. *Id.* at 1174-75.

[10] The record supports the district court's factual findings, which are not clearly erroneous. Cassirer has produced numerous examples of the Foundation's commercial activity in the United States that are "of a kind in which a private party might engage." *Siderman*, 965 F.2d at 708 (internal quotation marks omitted). Much of that activity was connected with the Painting. Thus, Cassirer has adequately demonstrated that the Foundation has engaged in sufficient commercial activity in the United States to satisfy § 1605(a)(3).

IV. Exhaustion of Remedies.

[11] Cassirer unsuccessfully petitioned the Foundation for return of the Painting, but Cassirer has not alleged that he made recourse to the Spanish or German judiciaries to settle his claim to the Painting.[14]

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[14] The record does not indicate what, if any, judicial actions have been brought in Germany. We note that there is some indication in publicly available material that, in 1958, the West German

Thus, Spain argues that § 1605(a)(3) cannot apply, because Cassirer has not exhausted judicial remedies in the foreign forum. The district court held that the plain language of § 1605(a)(3) of the FSIA contains no "exhaustion-of-foreign-remedies requirement" and therefore the court refused to impose such a requirement on Cassirer. *Cassirer*, 461 F. Supp. 2d at 1164. Whether the FSIA, specifically § 1605(a)(3), requires exhaustion is a matter of statutory interpretation and an issue of first impression.

"Of paramount importance to any exhaustion inquiry is congressional intent." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (citing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982) (internal quotation marks omitted)), *superceded by statute as stated in Booth v. Churner*, 532 U.S. 731, 732 (2001).[15] "Where Congress specifically mandates, exhaustion is required." *Id.* (citing *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989); *Patsy*, 457 U.S. at 502 n.4). "But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy*, 503 U.S. at 144 (citing *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971)). To discern the

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government may have acknowledged Lilly Cassirer to be the legal owner of the Painting, conceding that she retained the full rights of ownership. *See* Emma Daly, *American Says Painting in Spain is Holocaust Loot*, N.Y. Times, Feb. 10, 2003, at E1.

[15] Although these decisions generally involve the exhaustion of administrative remedies, we have previously approached exhaustion of claims invoking international law in a manner consistent with our application of exhaustion in other domestic contexts. *See Sarei*, 550 F.3d at 831-32 ("[E]xhaustion under the [Alien Torts Statute] should be approached consistently with exhaustion principles in other domestic contexts.").

intent of Congress, " '[w]e look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy.' " *United States v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008) (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001)).

[12] As the district court noted, the FSIA is silent as to any exhaustion requirement. The legislative history is also devoid of any enlightening reference to exhaustion.[16] Accordingly, we hold that Congress has

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[16] Cassirer's argument that Congress's prior inclusion of an arbitration requirement in § 1605(a)(7)(B)(I) evidences an intent to exclude an exhaustion requirement from § 1605(a)(3) is not persuasive. A mandatory arbitration requirement, although similar, is not the same as an exhaustion-of-local-remedies requirement. The phrase "local remedies" has been "interpreted broadly, [to include] the whole system of legal protection, as provided by municipal law, not only the courts and tribunals but also the use of procedural facilities which municipal law makes available to litigants." Restatement (Third) of Foreign Relations Law § 713, Reporters' Note 5 (citing *Ambatielos Case (Greece v. United Kingdom)*, 1951, 12 R. Int'l Arb. Awards 91, 120, 122) (internal quotation marks omitted). Therefore, one might fulfil an arbitration requirement without exhausting local remedies.

Further, § 1605(a)(7)(B)(I) was enacted approximately twenty years after § 1605(a)(3). Thus, the *exclusio unius* doctrine does not apply. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (noting that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (internal quotation marks omitted). For this reason, we disagree with the D.C. Circuit's suggestion that the inclusion of § 1605(a)(7)(B)(I) "strengthens the inference that its omission from a closely related section must have been intentional." *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 948 (D.C. Cir.

not clearly required exhaustion for claims brought under the FSIA. This, however, does not end our analysis.

To determine whether an action brought against a foreign state (invoking an exception to the FSIA) requires exhaustion, it is important to put into context what the FSIA is and what it is not. The FSIA is not a source of substantive law and does not create any causes of actions. Rather, it is a jurisdictional statute incorporating international law principles to guide U.S. courts in determining when a foreign state is or is not entitled to sovereign immunity. *See* § 1602. In other words, claims brought in U.S. courts, against foreign states, for violations of international law depend on the applicability of an exception to the FSIA for jurisdiction. Such claims, however, depend on the law of nations to define the substantive rights embodied in any cause of action. The Supreme Court has similarly recognized the Alien Tort Statute (ATS), 28 U.S.C. § 1350, to be a jurisdictional statute that creates no new causes of action and relies on the common law and the present-day law of nations to define substantive rights. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) ("[T]he ATS is a

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2008) (suggesting, but not deciding, that § 1605(a)(3) does not impose an exhaustion requirement).

Congress has since repealed the arbitration requirement of § 1605(a)(7). *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, div. A, § 1083(b)(1)(A)(iii), 122 Stat. 3, 341 (2008) (repealing 28 U.S.C. § 1605(a)(7)).

jurisdictional statute creating no new causes of action . . .).[17]

[13] The doctrine of exhaustion of domestic remedies is a "well-established rule of customary international law." *See Sarei*, 550 F.3d at 829 (quoting *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 26 (Mar. 29)). This rule generally provides that a state is not required to consider a claim, made by a person against a foreign state, and alleging a violation of international law "until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged." *See Sarei*, 550 F.3d at 829 (citing Restatement (Third) of Foreign Relations Law § 713 cmt. f & § 703 cmt. d)). Because United States courts import well-settled principles of international law to define substantive rights in cases brought under the FSIA, there are logical arguments suggesting that courts should also import the well-settled limitations to such causes of action, including the doctrine of exhaustion of remedies. *Cf. Sarei*, 550 F.3d at 833-35 (Bea, J., concurring) (discussing exhaustion in the context of the ATS); *Sarei*, 487 F.3d at 1231-45 (Bybee, J., dissenting) (same). Nonetheless, where Congress has not clearly required exhaustion, we have not (and likely cannot) impose exhaustion as an absolute jurisdictional requirement. *See Sarei*, 550 F.3d at 824 ("[W]e decline to impose an absolute requirement of exhaustion in ATS cases."). *See also Sampson v.*

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[17] The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Federal Republic of Germany, 250 F.3d 1145, 1153-54 (7th Cir. 2001) ("[A]lthough international law is 'part of our law,' it does not follow that federal statutes must be read to reflect the norms of international law.") (citation omitted).

The jurisdiction of federal courts derives from and is circumscribed exclusively by Article III of the United States Constitution and by federal statutes enacted by Congress. *See Karcher v. May*, 484 U.S. 72, 77 (1987) ("The power of federal courts to hear and decide cases is defined by Article III of the Constitution and by the federal statutes enacted thereunder."); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions. . . . Courts created by statute can have no jurisdiction but such as the statute confers."). In the domestic context, we have acknowledged that statutory exhaustion requirements are jurisdictional in nature. *See Sarei*, 550 F.3d at 828 & n.6 (gathering cases).[18] Where Congress requires

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[18] *See, e.g.*, *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989) (establishing that "exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute"); *Weinberger v. Salfi*, 422 U.S. 749, 764-67, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975) (holding 42 U.S.C. § 405(h) of the Social Security Act contains a jurisdictional exhaustion requirement); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) (holding that exhaustion of administrative remedies under 8 U.S.C. § 1252(d)(1) is a jurisdictional requirement, and failure to exhaust deprives the court of subject-matter jurisdiction); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 112-13 (D.C. Cir. 1989) (interpreting Federal Power Act statute, 16 U.S.C. § 825/(b), to provide a jurisdictional exhaustion requirement); *Dhangu v. INS*, 812 F.2d 455, 460 (9th Cir. 1987) (stating that exhaustion of

exhaustion, a failure to exhaust available remedies typically deprives the federal court of jurisdiction. Such is not necessarily the case, however, when international norms, and not Congress, purport to circumscribe jurisdiction by requiring exhaustion of remedies. International law may define the substantive rights of parties in actions permitted by the FSIA, but it cannot compel or restrict Article III jurisdiction. *Cf. Sampson*, 250 F.3d at 1152 ("[I]nternational law itself does not mandate Article III jurisdiction over foreign sovereigns."). Absent clear Congressional intent, we cannot incorporate exhaustion as an absolute requirement merely because international law would require it. An absolute exhaustion requirement amounts to an absolute limitation on the jurisdiction of federal courts. To impose such a requirement would, in essence, usurp the Constitutional power vested in Congress and cede foreign lawmakers and jurists with power to limit the jurisdiction of United States federal courts.

[14] Neither Congress nor this court have imposed an absolute exhaustion of remedies requirement in cases brought against foreign states under an exception to the FSIA. Yet, where principles of international comity and rules of customary international law require exhaustion, we exercise sound judicial discretion and consider exhaustion on a prudential, case-by-case basis. *See Sarei*, 550 F.3d at 828. *In Sarei*, we held that domestic prudential

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administrative remedies with the BIA is a jurisdictional requirement); *Lindsey v. U.S.*, 448 F. Supp. 2d 37, 51 (D.D.C. 2006) (interpreting provision of the Internal Revenue Code, 26 U.S.C. § 7422(a), as imposing a jurisdictional exhaustion requirement).

standards and core principles of international law require a district court to consider exhaustion in appropriate cases. *Id.* at 824 (citing *Sosa*, 542 U.S. at 733 n.21).[19] Under our prudential approach, when a defendant affirmatively pleads failure to exhaust remedies, the district court must, as a discretionary matter, determine in the first instance whether to impose such a requirement on a plaintiff. *Id.* at 832.

[15] Although *Sarei* addressed exhaustion in the context of the ATS, where Congress has not clearly adopted or rejected exhaustion as a jurisdictional prerequisite, our formulation of prudential exhaustion applies equally to cases brought against foreign states (and their instrumentalities) under the FSIA.[20] In this

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[19] Justice Breyer, joined by Justice Souter, indicated, in dicta, that they would likely read § 1605(a)(3) to require exhaustion. Concurring in *Republic of Austria v. Altmann*, Justice Breyer wrote "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking. . . . A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the expropriating state may have trouble showing a tak[ing] in violation of international law." *Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring) (internal quotation marks omitted).

[20] We respectfully disagree with the concurring-and-dissenting opinion's conclusion that *Sarei* is not on point. As in *Sarei*, the substantive claims here are based on alleged violations of international law. Both the ATS (at issue in *Sarei*) and the FSIA are jurisdictional statutes, and Congress has not expressly required or rejected exhaustion in either. With regard to principles of prudential exhaustion, the only meaningful difference between the international tort claims in *Sarei* and the claims made in the present case (and the only reason the FSIA is at issue) is that the defendant here is a sovereign foreign state. That is, if the defendant here were a private party, there could be

case, Appellants have asserted that Cassirer failed to exhaust available remedies in Spain or Germany. Although the district court correctly concluded that the FSIA does not require exhaustion of remedies, the court erred by failing to conduct a prudential exhaustion analysis.[21]

On remand, the district court should be guided by the principles we outlined in *Sarei*. Summarizing the *Sarei* framework generally, we first note that the district court need only consider exhaustion to the extent the defendant has affirmatively pleaded Cassirer's failure to exhaust local remedies. *See Sarei*, 550 F.3d at 832 ("The defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies.") (citation omitted).

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little doubt that *Sarei* would apply. That the defendant is a foreign state does not undermine the applicability of *Sarei*. Rather, that fact and the principles of international comity weigh strongly in favor of the district court's consideration of exhaustion of local remedies on a prudential basis.

[21] Contrary to the concurring-and-dissenting opinion's assertion, we are not writing an absolute exhaustion requirement into the FSIA. Nor are we absolutely precluding an exhaustion requirement where one might ordinarily be required by the applicable international law and justified under the circumstances. We do not hold that the district court must impose an exhaustion requirement in this case. Rather, we direct the district court (in the absence of clear Congressional intent otherwise) to examine the record before it, the applicable substantive law, and various equitable factors and then to carefully weigh whether to require exhaustion of local remedies on the claims before it. Where Congress has neither clearly imposed or rejected exhaustion as a prerequisite to exercising jurisdiction against a foreign state, the district court has discretion to consider exhaustion on a prudential basis. *See Sarei*, 550 F.3d at 828.

Second, the court must consider whether Congress has clearly required exhaustion for the specific claims asserted in the complaint. If, as in this case, Congress has not imposed or rejected such a requirement, the court must then determine whether the applicable substantive law would require exhaustion.[22] Third, the court must consider whether the defendant has met its burden to show the availability of local remedies and that such remedies have not been exhausted. *Id.* The plaintiff may rebut a showing of unexhausted remedies abroad by demonstrating the futility of exhaustion ("by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."). *Id.* (citations omitted). Finally, the court may, in its sound discretion, impose or waive exhaustion after assessing the availability, effectiveness, and possible futility of any unexhausted remedies in light of various prudential factors, including but not limited to: (1) the need to safeguard and respect the principles of international comity and sovereignty, (2) the existence or lack of a significant United States "nexus,"[23] (3) the nature of the

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[22] Although exhaustion is, generally, a well-established rule of international law, it may not be firmly established in all areas of international law. *See Sarei*, 550 F.3d at 844 (Reinhardt, J., dissenting) (discussing exhaustion in the context of international human rights).

[23] The concurring-and-dissenting opinion would limit the reach of *Sarei* by suggesting that prudential exhaustion applies only in cases where there is a weak nexus with the United States. Therefore, the concurring-and dissenting opinion suggests that, if an FSIA exception to sovereign immunity applies, then prudential exhaustion should not be considered because the claim necessarily has a strong nexus with the United States. We respectfully disagree. First, we do not read *Sarei* to hold that exhaustion may

allegations and the gravity of the potential violations of international law, and (4) whether the allegations implicate matters of "universal concern" for which a state has jurisdiction to adjudicate the claims without regard to territoriality or the nationality of the parties. *See id.* at 830-31.

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only be considered where there is a weak nexus to the United States. As we explained in *Sarei*, "The lack of a significant U.S. 'nexus' is an *important* consideration in evaluating whether plaintiffs should be required to exhaust their local remedies in accordance with the principle of international comity." *Sarei*, 550 F.3d at 831 (emphasis added). That is, courts should "carefully consider the question of exhaustion," particularly where the nexus is weak and where the claims "do not involve matters of 'universal concern.'" *See id.*

Second, some of the exceptions to sovereign immunity under the FSIA require little (if any) nexus with the United States. *See, e.g.*, § 1605(a)(1) (exception to sovereign immunity where there is an explicit or implicit waiver of immunity by the foreign state); § 1605(a)(6) (exception to sovereign immunity for actions to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration); § 1605(b) (exception to sovereign immunity for a suit in admiralty brought to enforce a maritime lien against a vessel or cargo of the foreign state which maritime lien is based upon a commercial activity of the foreign state). *But see, e.g.*, §§ 1605(a)(2)-(5) (generally requiring that the foreign state have engaged in some commercial activity within or having direct impact in the United States). Thus, we cannot say that a claim's nexus with the United States is necessarily strong any time an exception to sovereign immunity applies. In some cases, a relatively isolated or weak nexus may be sufficient to subject a foreign state to jurisdiction. Yet a weak nexus may also weigh in favor of requiring exhaustion of local remedies in the appropriate case.

V. Conclusion.

[16] We dismiss this appeal with regard to the issues of personal jurisdiction, standing, and Article III case or controversy. We affirm the district court with regard to its statutory interpretation of 28 U.S.C. § 1605(a)(3). We likewise affirm the district court's conclusion that the Foundation engaged in sufficient commercial activity within the United States to satisfy the requirements of § 1605(a)(3). We reverse the district court, however, with regard to exhaustion of remedies and we remand for the limited purpose to determine in the first instance whether to impose an exhaustion requirement on Cassirer.

AFFIRMED in part, REVERSED in part, and **REMANDED.**

Each party shall bear its own cost.

IKUTA, J., concurring in part and dissenting in part:

I concur in Sections I, II and III. I disagree with Section IV, however, because in my view we should not take it upon ourselves to write an exhaustion requirement into the Foreign Sovereign Immunities Act ("FSIA") when Congress has chosen not to. In enacting the FSIA, Congress created uniform and clear standards for litigants seeking to bring lawsuits against foreign sovereigns, and there is no indication that Congress contemplated that courts would impose an additional exhaustion requirement on litigants. Moreover, our case law on prudential exhaustion in the context of the Alien Tort Statute ("ATS") is both

inapposite and non-binding. Because imposing a judge-made exhaustion requirement here is contrary to Congressional intent and does nothing more than create a trap for the unwary, I respectfully dissent.

I

As always, we begin with the plain language of the statute. *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002). As the majority acknowledges, the FSIA does not include an exhaustion requirement. Maj. Op. at 12711-12.

Nor is there any evidence that Congress intended to require plaintiffs to exhaust their remedies in a foreign nation before bringing suit under the FSIA. To the contrary, as explained below, the history of the FSIA indicates that Congress intended to create a comprehensive scheme governing lawsuits in federal courts against a foreign sovereign that would establish once and for all a plaintiff's rights, thereby eliminating inconsistency and uncertainty.

Before the enactment of the FSIA, federal courts "deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983) (citing *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812)). Before 1952, the Executive Branch generally asked federal courts to recognize the sovereign immunity of friendly sovereigns in all lawsuits. *Id.* In 1952, however, the State Department changed course, and announced that the Executive Branch had adopted

the "restrictive theory" of sovereign immunity,[1] under which the Executive Branch would request courts to recognize sovereign immunity only in "suits involving the foreign sovereign's public acts," and not in "cases arising out of a foreign state's strictly commercial acts." *Id.* at 487.

Judicial application of the restrictive theory "proved troublesome" however. *Id.* Foreign sovereigns often put diplomatic pressure on the State Department to recommend that courts recognize sovereign immunity in cases not fitting the restrictive theory, and the Executive Branch's involvement in judicial immunity determinations proved inconsistent. *Id.* These problems resulted in a lack of uniform, predictable standards regarding when federal courts would exercise jurisdiction in lawsuits against foreign sovereigns. *See id.* at 487-88; *see also Republic of Austria v. Altmann*, 541 U.S. 677, 690-91 (2004).

Seeking to remedy these problems, Congress passed the FSIA in 1976. *Id.* at 691. The statute's purpose was "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that decisions are made on purely legal grounds and under procedures that insure due process." *Verlinden*, 461 U.S. at 488 (internal quotation marks omitted) (citing H.R. REP. No. 941487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605).

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[1] *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984-85 (1952).

The FSIA "codified], as a matter of federal law, the restrictive theory of sovereign immunity," and created "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.* Section 2 of the FSIA added § 1330(a) to Title 28, thereby conferring on federal courts subject matter jurisdiction "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a) (2006).[2] Section 1604 pro vides foreign sovereigns with a presumption of immunity,[3] and §§ 1604 and 1330(a) "work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United

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[2] The full text of § 1330(a) states:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a).

[3] 28 U.S.C. § 1604 (2006) states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

States citizens and by aliens when a foreign state is *not* entitled to immunity" by operation of an exception in §§ 1605 to 1607. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The exceptions to immunity in §§ 1605 to 1607 (including actions based on specified commercial activities, rights in personal and real property under certain conditions, and enforcement of certain agreements, among others) generally require "some form of substantial contact with the United States." *Verlinden*, 461 U.S. at 490 (citing 28 U.S.C. § 1605).

If a foreign state is not entitled to sovereign immunity under the FSIA, it is treated like any other private individual litigant (with the exception that punitive damages are unavailable),[4] because the state is acting as a private party rather than a sovereign exercising power over its own citizens. *See Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) ("A foreign state engaging in 'commercial' activities does not exercise powers peculiar to sovereigns; rather, it exercises only those powers that can also be exercised by private citizens." (internal quotation marks and alterations omitted)); *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 200-01 (2007) (holding that a foreign sovereign is not immune from an action for declaratory relief regarding tax liens on the sovereign's real property, and stating that "property ownership is not an inherently sovereign function"); *Weltover*, 504 U.S. at 614 (holding that sovereign immunity does not apply "when a foreign government acts, not as a regulator of a

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[4] *See* 28 U.S.C. § 1606 (2006).

market, but in the manner of a private player within that market").

The FSIA "governs the types of actions for which foreign sovereigns may be held liable in a court in the United States," *Verlinden*, 461 U.S. at 496-97, but it does not focus on international law claims. Rather, it "merely opens United States courts to plaintiffs with pre-existing claims against foreign states[.]" *Altmann*, 541 U.S. at 695; *see also id.* at 704 (Scalia, J., concurring) (noting that plaintiff's claims were based primarily in California law and explaining that "the FSIA affects substantive rights only accidentally, and not as a necessary and intended consequence of the law"). The FSIA treats claims arising under international law the same as claims arising under federal or state law, granting federal courts jurisdiction over foreign sovereigns in circumstances that meet the requirements of §§ 1605 to 1607, while granting immunity "in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." *Amerada Hess*, 488 U.S. at 439, 443 (holding that federal courts lacked jurisdiction over a Liberian corporation's suit against Argentina for damage to an oil tanker during war between Great Britain and Argentina, because the FSIA was the sole source of jurisdiction over a foreign state, and it did not authorize jurisdiction in that case); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) (holding district court lacked jurisdiction over claims against Saudi Arabia for wrongful arrest, imprisonment, and torture because the "conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for

purposes of the restrictive theory as peculiarly sovereign in nature").

In short, the FSIA established clear and comprehensive standards regarding the limited situations in which Congress deemed it appropriate to allow plaintiffs to sue foreign sovereigns in federal courts. Plaintiffs may bring such suits only in cases having a substantial connection to the United States and involving claims relating to a sovereign's private or commercial activities. The purpose of this comprehensive framework was to rectify the inconsistency and lack of uniformity that had previously beleaguered litigants. The Supreme Court has emphasized "the importance of developing a uniform body of law in this area," and that the FSIA's "standards control in the courts of the United States and of the States." *Verlinden*, 461 U.S. at 489 (internal quotation marks omitted).[5]

II

Given Congress's intent to establish a uniform and consistent framework for jurisdiction over and litigation involving foreign sovereigns, and given that Congress chose not to include an exhaustion requirement in the FSIA, there appears to be little room for federal courts to impose a new, judge-made requirement on top of the statutory requirements already in the FSIA itself. "[F]ederal courts are vested

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[5] The Court has further explained that "Congress'[s] intention to enact a comprehensive statutory scheme is also supported by the inclusion in the FSIA of provisions for venue, 28 U.S.C. § 1391(f), removal, § 1441(d), and attachment and execution, §§ 1609-1611." *Amerada Hess*, 488 U.S. at 435 n.3.

with a virtually unflagging obligation to exercise the jurisdiction given them," *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (internal quotation marks omitted), and courts have no authority to devise an additional exhaustion requirement when a statute clearly sets out the prerequisites for federal jurisdiction, *see Darby v. Cisneros*, 509 U.S. 137, 138 (1993).

A

In imposing a judge-made exhaustion requirement on litigants in the FSIA context, the majority relies primarily on cases addressing exhaustion of administrative remedies. Maj. Op. at 12710-11 (citing *McCarthy*, 503 U.S. at 145; *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982); *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971)). Because the reasoning in these cases is based on considerations of separation of powers, administrative efficiency and expertise, and other agency-related concerns, they provide little assistance in determining whether an exhaustion requirement should be imposed in the FSIA context. *See, e.g.*, *McCarthy*, 503 U.S. at 145 ("[T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress'[s] delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."); *accord McGee*, 402 U.S. at 484 (noting that the task for courts in deciding the applicability of the administrative exhaustion requirement is "whether allowing all similarly situated registrants to bypass the administrative avenue in question would seriously impair [the agency's] ability

to perform its functions") (internal quotation marks and modifications omitted).

To the extent it is appropriate to look to these cases for guidance, they do not support the majority's conclusion. Rather, they counsel exercising caution and considering carefully whether an exhaustion requirement is consistent with congressional intent. In both *McCarthy* and *Patsy*, the Supreme Court looked first for an indication that Congress intended to impose exhaustion requirements upon plaintiffs. *See McCarthy*, 503 U.S. at 144 ("[A]ppropriate deference to Congress'[s] power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme."); *Patsy*, 457 U.S. at 501-02 ("[T]he initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent."). The Court has rarely discerned such an intent, and indeed has in general declined to require claimants to exhaust administrative remedies when it is not required by statute. *See, e.g.*, *Darby*, 509 U.S. at 138 (holding that courts may not impose a prudential exhaustion requirement on litigants under the Administrative Procedure Act when "neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review."); *McCarthy*, 503 U.S. at 149 (holding that a prisoner was not required to exhaust the Bureau of Prisons' administrative procedure before making a *Bivens* claim for money damages); *Coit*, 489 U.S. at 565 (holding that creditors were not required to exhaust the Federal Home Loan Bank Board's

administrative claims procedure before bringing suit against a federal bank); *Patsy*, 457 U.S. at 516 (holding that a plaintiff claiming discriminatory treatment was not required to exhaust state administrative remedies before bringing a § 1983 claim in federal court).[6]

Nothing in these administrative law cases suggests that a court should require exhaustion in the FSIA context, where allowing plaintiffs immediate access to federal courts does not raise any risk of undermining the Congressional scheme. To the contrary, imposing an exhaustion requirement not contemplated by Congress is inconsistent with Congress's intent to have the FSIA's "comprehensive jurisdictional scheme" provide litigants with "clear guidelines" that were previously lacking. *Altmann*, 541 U.S. at 699, 700; *see also Darby*, 509 U.S. at 147 (refusing to impose additional exhaustion requirements under the APA, noting that doing so would "transform [the APA

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[6] Only one of the cases cited by the majority held that a claimant must exhaust administrative remedies before initiating suit in federal court, and that case arose in the unique context of the federal Selective Service system. *McGee v. United States*, 402 U.S. at 485. Before requiring exhaustion, the Court undertook "a discrete analysis of the particular default in question, to see whether there is a governmental interest compelling enough to justify the forfeiting of judicial review." *Id.* (internal quotation marks omitted). In this context, the Court determined that a deliberate flouting of the administrative processes would undermine "the scheme of decisionmaking that Congress has created," and "jeopardize the interest in full administrative fact gathering and utilization of agency expertise." *Id.* at 484, 486; *see also McKart v. United States*, 395 U.S. 185, 195 (1969) ("In Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created.").

provision] from a provision designed to remove obstacles to judicial review of agency action into a trap for unwary litigants." (internal quotation marks omitted)). When Congress seeks to create such uniformity and clear standards for litigants, *see Verlinden*, 461 U.S. at 488, the administrative law cases cited by the majority counsel that we should defer to Congressional intent and decline to impose a new exhaustion requirement that will create a trap for unwary plaintiffs. *Cf. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485-86 (1999) (holding that imposing a prudential exhaustion requirement was inappropriate where Atomic Energy Act gave district courts original jurisdiction over certain types of cases, and imposing such a requirement "would invite precisely the mischief . . . that the Act sought to avoid").

B

Nor is the majority's assertion that *Sarei* compels us to write an exhaustion requirement into the FSIA persuasive. Maj. Op. at 12715-16; *see Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc) (plurality op.). First, the lead opinion in *Sarei*, which adopts the principle of prudential exhaustion for purposes of the Alien Tort Statute (ATS), is a plurality opinion that is not binding on subsequent panels. *See Nevius v. Sumner*, 105 F.3d 453, 460 n.6 (9th Cir. 1996).

Second, even as persuasive authority, *Sarei* is not on point. In *Sarei*, the plaintiffs (who were aliens) brought a lawsuit under the ATS charging a British corporation with violations of customary international law regarding matters of universal concern stemming

from its operations in Papua New Guinea. *Sarei*, 550 F.3d at 825-26.[7] As noted by the plurality, this lawsuit had no nexus of any kind with the United States. *Id.* at 831. The *Sarei* plurality was concerned that the ATS gave courts potentially sweeping jurisdiction over civil tort actions raising customary international law claims that lacked any nexus to the United States. *Id.* In order to cabin this supposed limitless jurisdictional reach, the plurality adopted the Supreme Court's suggestion in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), that federal courts consider adopting a prudential exhaustion requirement as a jurisdiction-limiting principle in the appropriate circumstances. *Sarei*, 550 F.3d at 824. *Sarei* held that prudential exhaustion is appropriate in cases "where the United States 'nexus' is weak" particularly "with respect to claims that do not involve matters of 'universal concern.'" *Id.* at 831.

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[7] Specifically, the plaintiffs brought claims alleging:

> (1) crimes against humanity resulting from the blockade; (2) war crimes for murder and torture; (3) violation of the rights to life, health, and security of the person resulting from the environmental damage; (4) racial discrimination in destroying villages and the environment, and in working conditions; (5) cruel, inhuman, and degrading treatment resulting from the blockade, environmental harm, and displacement; (6) violation of international environmental rights resulting from building and operating the mine; and (7) a consistent pattern of gross violations of human rights resulting from destruction of the environment, racial discrimination, and [Papua New Guinea] military activities.
>
> Sarei, 550 F.3d at 825-26.

The concerns expressed by the *Sarei* plurality are not at issue in the FSIA context. There is no analogous concern about unlimited jurisdiction due to the lack of a nexus with the United States: Unlike the ATS (in which courts must create jurisdiction-limiting principles), the FSIA does not give federal courts jurisdiction unless the claim has a nexus to the United States as required by § 1605. In enacting the FSIA, "Congress was aware of concern that our courts might be turned into small international courts of claims, open to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *Verlinden*, 461 U.S. at 490 (internal quotation marks and alteration omitted). The FSIA "protect[s] against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." *Id.* (citing 28 U.S.C. § 1605).[8] Although the Supreme Court recognized that the implications of vast, unchecked federal jurisdiction under the ATS would be "breathtaking," *Sosa*, 542 U.S. at 736, these concerns are simply not present under the FSIA.

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[8] The Supreme Court has acknowledged that certain provisions of the FSIA do not (on their face) require a nexus to the United States. For example, the Court explained that "Section 1605(a)(1), which provides that sovereign immunity shall not apply if waived, may be seen as an exception to the normal pattern of the Act, which generally requires some form of contact with the United States." *Verlinden*, 461 U.S. at 491 n.15. In noting "[w]e need not decide whether, by waiving its immunity, a foreign state could consent to suit based on activities wholly unrelated to the United States," *id.*, the Court hinted that such a nexus might nevertheless be necessary in order for a federal court to have jurisdiction over a foreign sovereign under the FSIA.

Moreover, the concern that jurisdictional overreaching under the ATS could have a negative effect on foreign relations, *see Sosa*, 542 U.S. at 727, are not present in the FSIA context. The FSIA's jurisdictional reach is consistent with that exercised by foreign nations over the United States. Indeed, the Supreme Court noted that Congress "join[ed] the majority of other countries by adopting the 'restrictive theory' of sovereign immunity[.]" *Permanent Mission of India*, 551 U.S. at 199; *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 702 & n.15 (1976) (explaining that the United States adopted the restrictive view in part based "on the fact that this approach has been accepted by a large and increasing number of foreign states in the international community," and listing countries). Further, the Supreme Court has recognized that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Id.* at 703-04. Here, Cassirer's case is a property dispute with Spain in its role as a private party, not as a sovereign exercising power over its own citizens.[9]

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[9] Contrary to the majority's assertion, Cassirer does not bring claims "based on non-domestic, international law," Maj. Op. at 12715 n.20, but rather brings state common-law claims of conversion. Indeed, allegations similar to those in Cassirer's complaint have been made, and adjudicated, in lawsuits between two private persons. *See, e.g.*, *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987) (painting owner's heir brought conversion suit against good-faith purchaser for return of oil painting by Claude Monet, allegedly stolen during the Second World War).

In sum, while the *Sarei* plurality strove to fill in both procedural and substantive gaps in the ATS to cabin its potentially unlimited jurisdiction and avoid impinging on relations with foreign sovereigns, *see Sosa*, 542 U.S. at 727, applying the FSIA's clear language does not require the same creative approach. In creating the FSIA's comprehensive and detailed scheme, Congress expressed its intent that foreign sovereigns meeting the statutory criteria be subject to suit in federal court, and did not invite us to read in anything more. *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States *in conformity with the principles set forth in this chapter*." (emphasis added)); *Amerada Hess*, 488 U.S. at 434 (concluding that "the text and structure of the FSIA demonstrate Congress'[s] intention that the FSIA be the *sole basis* for obtaining jurisdiction over a foreign state in our courts" (emphasis added)).

III

Nothing in the statutory language, history, or the Supreme Court's interpretation of the FSIA suggests that we should read an exhaustion requirement into the statute. Doing so will tend to defeat Congress's goal of achieving consistency and uniformity in suits against foreign sovereigns. The concerns addressed by the *Sarei* plurality are entirely distinguishable, and in any event, the plurality's decision to write an exhaustion requirement into the ATS is not binding on us. There is no need to create judge-made law in this context, and therefore, I would refrain from doing so. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA

Case No. CV 05-3459-GAF (CTx)

[Filed August 30, 2006]

CLAUDE CASSIRER,	)
	)
Plaintiff,	)
	)
v.	)
	)
KINGDOM OF SPAIN, et al.,	)
	)
Defendants.	)
	)

MEMORANDUM AND ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS

I.

INTRODUCTION & BACKGROUND

A. THE LAWSUIT

In the present lawsuit, Plaintiff, the grandson of Lilly Cassirer Neubauer, seeks to recover from the

Kingdom of Spain ("Spain") and the Thyssen-Bornemisza Collection Foundation (the "Foundation"), a painting by Camille Pissaro (the "Painting") that the Nazis extorted from his grandmother in 1939 as a condition to issuing her an exit visa. After World War II, the painting changed hands several times, ultimately ending up in the hands of Baron Thyssen-Bornemisza, one of the, world's foremost art collectors. In 1988, when the Baron loaned his collection, including the Painting, to Spain under contract, Spain spent millions of dollars to refurbish a state-owned palace, the Villahermosa, and provided it at no charge as the home for the Thyssen-Bornemisza Museum (the "Museum") where the collection was displayed. (Compl. ¶¶ 29-30). Spain paid the Baron $50 million for a ten-year lease of the collection, but in 1993 paid an additional $327 million to enable the Foundation to purchase the entire collection. (Id.).

Plaintiff claims that he first learned in 2000 that the Foundation was in possession of the Painting, which he contends was the first information he had regarding its whereabouts since it was taken in 1939. (Id. ¶ 31). In 2001, he petitioned Spain's then Minister of Education, Culture and Sports, Pilar del Castillo Vera, for the Painting's return. Plaintiff's request was refused. (Id. ¶ 32). In July 2003, five United States Congressmen wrote to Minister del Castillo Vera requesting that Spain and the Foundation return the Painting to Cassirer, its rightful owner. (Id. ¶ 33). When del Castillo Vera again refused, Plaintiff filed suit in this Court seeking recovery of the Painting and a variety of other remedies. Plaintiff has never attempted to obtain the Painting through judicial proceedings initiated in Spain.

B. The Motions to Dismiss

Defendants now move under Fed. R. Civ. P. ("Rule") 12(b) to dismiss this lawsuit on various procedural grounds. They contend: (1) on the basis of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1602, et seq., that this Court lacks subject matter jurisdiction over the dispute; (2) under International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny, that this Court lacks personal jurisdiction over Defendants; and (3) that the Central District of California is not the proper venue for the lawsuit. Spain also moves under Rule 12(b)(6) for dismissal for failure to state a claim. The parties have submitted detailed memoranda and a substantial volume of evidence in support of and in opposition to each of Defendants' motions, which the Court has read and considered. In the interests of brevity and expedition, the Court will confine itself to a relatively brief discussion of the issues and their resolution, since all parties have clearly indicated that those on the losing side wish to present these issues to the Ninth Circuit Court of Appeals as soon as possible. In that regard, the Court is persuaded that this "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Therefore, the Court hereby **CERTIFIES** this matter for interlocutory appeal.

C. The Issue Presented

Although Defendants raise a number of questions subsidiary to the principal issue before the Court, the fundamental question for resolution is whether this

Court may properly assert jurisdiction over the present dispute under the "expropriation" or "takings" exception to the FSIA for cases involving property expropriated in violation of international law. 28 U.S.C. § 1605(a)(3).

II.

DISCUSSION

Sovereigns are ordinarily immune from suit in the United States, 28 U.S.C. § 1604, unless the lawsuit against them falls into one of the statutorily created exceptions to sovereign immunity. Here, Plaintiff contends that this Court has subject matter jurisdiction on the basis of the exception established in 28 U.S.C. § 1605(a)(3), which provides in relevant part that a foreign state ***or*** its instrumentality is not immune from suit in any case

> in which rights in property taken in violation of international law are in issue and . . . ***that property*** or any property exchanged for such property ***is owned or operated by an agency or instrumentality of the foreign state*** ***and*** that agency or instrumentality is ***engaged in a commercial activity in the United States.***

28 U.S.C. § 1605(a)(3) (emphases added); 28 U.S.C. § 1603(a) (defining "foreign state" to include its agency or instrumentality). Several preliminary issues must be addressed before the Court comes to the principal issue to be decided. These are: (1) does this lawsuit present a case or controversy within the meaning of Article III of the United States Constitution; (2) is the Foundation an agency or instrumentality of Spain; (3)

must Plaintiff exhaust judicial remedies in the courts of the foreign state in possession of the property as a condition to pursuing his claim in this Court; (4) was the Painting taken by a "sovereign;" and (5) was the Painting taken from a citizen of the expropriating state such that the expropriation exception does not apply.

A. The Preliminary Issues

1. Case or Controversy

Citing to Allen v. Wright, 468 U.S. 737, 750 (1984), Spain contends that the current dispute does not present a "case or controversy" and therefore fails to meet the minimum requirement of Article III for the exercise of federal jurisdiction because Spain did not cause Plaintiff any injury that is "fairly traceable" to its actions, and a judgment will not redress Plaintiff's injury. See Bennett v. Spear, 520 U.S. 154, 162 (1997). But this argument begs the question of whether this Court may properly entertain an action to force Spain to disgorge the painting even though Spain was not involved in the illegal expropriation. On that subject, the Court has already been presented with and decided the issue of whether the phrase "taken in violation of international law" limited the Court's exercise of jurisdiction to sovereigns that had been involved in the initial taking. The Court concluded that the language of the statute contains no such limitation, and the logic of the few decisions that have decided the question teaches that no such limitation should be implied. (See generally Order Granting Mot. for Jurisdictional Discovery, Apr. 27, 2006).

Moreover, Defendants have not disputed that del Castillo Vera was presented with and denied Cassirer's requests that Spain return the Painting to him, (Compl. ¶¶ 32-33), which creates a factual dispute as to whether Cassirer or the Foundation owns the Painting. (8/14/06 Hearing Tr. at 38-39). Thus, whether or not Cassirer can ultimately establish an interest in the Painting, whether he can establish that his interest is superior to that of Spain and the Foundation, and whether he can establish a legal basis for vindicating that interest are all matters that must be left for another day. But the fact that such issues must be resolved tends to prove, rather than disprove, the existence of a case or controversy in the present circumstances. Accordingly, under the statute as construed by this Court, a case or controversy arising under federal law is presented and Article III does not preclude the Court from exercising jurisdiction over the case.

2. Agency or Instrumentality

The FSIA defines an "agency or instrumentality" of a foreign state as follows:

> (b) An "agency or instrumentality of a foreign state" means any entity--
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). An "agency or instrumentality" of the foreign sovereign, as distinct from the sovereign itself, engages in "core functions" that are predominantly commercial rather than governmental. See Garb v. Republic of Poland, 440 F.3d 579, 591 (2d Cir. 2006) (citing Transaero, Inc. v. La Fuerza Aeraa Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994) ("[I]mmunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.") (citations and quotation marks omitted)).

Spain half-heartedly argues that the Foundation is not an agency or instrumentality of the Spanish government, but even the Foundation disagrees. (See Foundation Mot. at 3). Here the Court is presented with unrebutted allegations that: (1) Spain arranged and was a party to the contract for the original loan of the collection that included the Painting and Spain paid the $50 million lease price for the Thyssen-Bornemisza collection; (2) Spain later paid the $327 million to fund the purchase of the Baron's entire collection; (3) Spain provided the facility, the Villahermosa palace, to be used as the Museum to house the collection; (4) Spain paid the cost of refurbishing that facility; (5) two-thirds of the Foundation's directors "must" be representatives of Spain, appointed by the Spanish government and freely removable through royal decree; and (6) many of Spain's governmental ministers serve as directors on the Foundation's board. (Compl. ¶¶ 9(a)-(d), 29-30).

The Court therefore concludes that the property in dispute is owned by an agency or instrumentality of Spain.

3. Exhaustion of Judicial Remedies

Defendants argue that, to take advantage of the FSIA exception to immunity, Plaintiff must exhaust his judicial remedies in the foreign state where the property is located. Spain relies heavily on a comment made by Justice Breyer in a concurring opinion in Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004), regarding the possibility that an exhaustion requirement "may" exist. However, the majority decision, which states the rule in the case, includes no holding that the statute requires exhaustion.

Of greater importance on this issue is the plain language of Section 1605(a)(3), which contains no exhaustion-of-foreign-remedies requirement. In fact, FSIA's Section 1605(a)(7)(B)(I), which incorporates a requirement that any claim thereunder first be pursued through arbitration before that exception applies, strongly suggests that the absence of a similar exhaustion requirement in the expropriation exception reflects the intent of Congress ***not*** to include an exhaustion requirement in Section 1605(a)(3). See Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 663 (9th Cir. 1988) ("Where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."). The Court therefore concludes that an exhaustion requirement should not be implied where Congress created no such obligation as a condition to the exercise of subject matter jurisdiction

under the expropriation exception to sovereign immunity.

4. TAKING BY A SOVEREIGN

The last two threshold issues more narrowly address the "taken in violation of international law" element of the FSIA expropriation exception.

Spain contends that since a Munich art dealer named Jakob Scheidwimmer was the one who allegedly demanded the Painting from Lilly Cassirer (the original owner), and Scheidwimmer was ***not*** an agent of the German government, that a "sovereign" did not take the Painting. (Spain Mot. at 11-12). The Court disagrees. While Spain is correct that "[t]he term 'taken' . . . clearly refers to acts of a sovereign, not a private enterprise, that deprive a plaintiff of property without adequate compensation," Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000), here, however, Plaintiff has both alleged that Scheidwimmer was an agent of the controlling Nazi party, (Compl. ¶ 23), and provided compelling expert evidence to that effect, (Petropoulos Decl., Ex. B [Expert Opinion Report] (Scheidwimmer was a "member of the Nazi Party, implemented state policies and can be viewed as an agent of the state")). See Altmann, 541 U.S. at 697 ("A Nazi lawyer. . . took possession of the six Klimts.").[1] Moreover, Defendants have not argued that the approximate $360 at 1939

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[1] The Court concludes that at this stage Mr. Petropoulos's testimony on these issues of German history, National Socialism, art looting and the Holocaust cannot be disregarded. (Petropoulos Decl. ¶ I; id., Ex. A [Petropoulos Curriculum Vitae]); see also Fed. R. Evid. 702.

exchange rates constituted just compensation, especially when, as Plaintiffs allege and Defendants have not refuted, Ms. Cassirer would never be permitted to withdraw the funds since they were paid into a blocked bank account. (Compl. ¶ 23). Apparently unable to rebut this evidence, Spain contends that this evidence is improperly beyond the scope of the pleadings. (Spain Reply at 7). However, since the Court granted jurisdictional discovery to resolve issues such as these, the evidence may properly be considered for purposes of determining FSIA jurisdiction. Adler v. Fed. Republic of Nig., 107 F.3d 720, 728 (9th Cir. 1997) ("A district court may properly look beyond the complaint's jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists.") (citations and quotation marks omitted); Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 305-06 (D.D.C. 2005) ("[T]he court must look beyond the parties' pleadings to resolve any factual disputes that are essential to its decision to retain jurisdiction or dismiss the action."). In any event, either based on a review of the evidence or strictly viewing the unrebutted allegation in the Complaint, Scheidwimmer can be considered as an agent of the Nazi German regime and the Court concludes that the taking of Ms. Cassirer's Painting was indeed by a sovereign.

5. Taking from a Non-Citizen

Finally, Spain contends that even if Scheidwimmer was an agent of Germany in taking the Painting, the taking was not "in violation of international law" since Ms. Cassirer was a German national and such a taking does not implicate violations of international law.

While correct on the law, the Court disagrees with Spain's factual premise.

The Court agrees that in order "[t]o fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." Altmann, 317 F.3d 654, 968 (9th Cir. 1998), aff'd, 541 U.S. 677 (citations and quotation marks omitted); Siderman de Blake v. Republic of Arg., 965 F.2d 699, 711 (9th Cir. 1992) ("Siderman"); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990). However, once again Plaintiff provides compelling evidence that Ms. Cassirer was not a German citizen at the time of Nazi Germany's taking of the Painting since, according to the Nazis' citizenship laws at that time, "[a] Jew cannot be a citizen of the Reich." (Pl.'s Request for Judicial Notice ("RFJN"), Exs., A, B & C [The New Social Order - Reich Citizenship Laws] Art. 4(1)).[2] Moreover, the law provided that "[a] citizen of the Reich is that subject only who is of German or kindred blood." (Id. at Art. 2). Spain's Reply brief completely fails to address this argument and the Court concludes that since Germany itself did not consider Ms. Cassirer to be a citizen, Ms. Cassirer's alleged German "citizenship" at the time of the taking does not preclude the application of the expropriation exception in this case.

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[2] The Court hereby takes judicial notice of these authoritative statements of law under the Nazi German regime. McGhee v. Arabian Am. Oil Co., 871 F.2d 1412, 1424 (9th Cir. 1989) ("[T]he court is permitted to take judicial notice of authoritative statements of foreign law."); Fed. R. Civ. 44.1.

B. PERSONAL JURISDICTION AND DUE PROCESS

Although it may seem odd to address personal jurisdiction before discussing subject matter jurisdiction, the two issues are intertwined in this case and the Court may properly address personal jurisdiction first. Anderman v. Fed. Republic of Austria, 256 F. Supp. 2d 1098, 1104 (C.D. Cal. 2003) ("[A] court may determine whether it has personal jurisdiction over a party before proceeding to determine whether it has subject-matter jurisdiction."). 28 U.S.C. § 1330(b), in clear language, states:

> Personal jurisdiction over a foreign state ***shall exist*** as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this Title.

(emphasis added). Subsection (a) states that the district courts have jurisdiction over any action against a foreign state in any case where the foreign state is not entitled to immunity. In short, if the Court has subject matter jurisdiction over a foreign sovereign or its instrumentality, and properly serves that entity under 28 U.S.C. § 1608, then personal jurisdiction follows as a matter of law under Section 1330(b).[3] As one district court recently explained:

> Unlike most statutes, the FSIA contains a specific provision for personal jurisdiction,

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[3] Neither Defendant contends that service of process was improper or otherwise ineffective under 28 U.S.C. § 1608.

> conditioning it on effective service of process and the existence of subject matter jurisdiction. Ordinarily, statutes do not contain requirements for personal jurisdiction. The reason is obvious: the sole source for personal jurisdiction over a ***person*** is the Constitution. A statute may not provide for personal jurisdiction where the Constitution forbids it. By providing for personal jurisdiction in the FSIA, Congress implicitly endorsed the view that the Constitution does not limit a court's jurisdiction in personam over foreign states.

Rux v. Republic of Sudan, No. 2:04cv428, 2005 U.S. Dist. LEXIS 36575, at *66 (E.D. Va. Aug. 26, 2005) (emphasis added). While not expressly determining that foreign states are "persons" for purposes of due process, the Supreme Court has explained:

> personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§ 1605-1607 applies. [Citation.] Congress' intention to enact a comprehensive statutory scheme is also supported by the inclusion in the FSIA of provisions for venue, 28 U.S.C. § 1391(f), removal, § 1441(d), and attachment and execution, §§ 1609-1611. Our conclusion here is supported by the FSIA's legislative history. See, e.g., H.R. Rep. No. 94-1487, p. 12 (1976) (H.R. Rep.); S. Rep. No. 94-1310, pp. 11-12 (1976) (S. Rep.) (FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by sovereign states before Federal and State courts in the United States," and "prescribes . . . the

> jurisdiction of U.S. district courts in cases involving foreign states.").

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435 n.3 (1989); see also Hilao v. Estate of Marcos (In re Estate of Marcos Human Rights Litig.), 94 F.3d 539, 545-46 (9th Cir. 1996). However, since most recently the Supreme Court and this Circuit have sidestepped the issue by "[a]ssuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619 (1992) ("Weltover"); see also Altmann, 317 F.3d at 970; Theo. H. Davies & Co. v. Republic of the Marshall Islands, 174 F.3d 969, 975 n.3 (9th Cir. 1998), the question of whether a foreign state is a "person" remains unsettled.

At the hearing, Defendants indicated that they agreed with the Court's conclusion that if subject matter jurisdiction exists through the Section 1605(a)(3) exception to sovereign immunity, then personal jurisdiction follows. However, Defendants concede this point only because it dovetails with their claim that the requirements of due process, as articulated in International Shoe and its progeny, have been subsumed in the subject matter jurisdiction analysis. On that basis, Defendants argue that the Court must assess whether the sovereign's commercial contacts with the United States are so continuous and systematic as to give rise to general jurisdiction or whether the sovereign's commercial activities in the United States with respect to the expropriated property give rise to specific jurisdiction in this case. Stated in a different way, Defendants contend that they are "persons" under the Due Process Clause,

which would then mandate that the Court undertake a "minimum contacts" analysis of the elements of the FSIA exception to sovereign immunity.

The Court disagrees. The Court recognizes that, in a number of decisions, including decisions in this Circuit, courts when confronted with the issue have "assum[ed] without deciding" that foreign sovereigns are "persons" under the Due Process Clause of the Constitution. See, e.g., Weltover, 504 U.S. at 619; Altmann, 317 F.3d at 970. Older cases predating Weltover and Altmann have also held in FSIA cases that, even if the foreign sovereign is not entitled to immunity, the exercise of personal jurisdiction must comport with the Due Process Clause. E.g., Olsen v. Gov't of Mexico, 729 F.2d 641, 648 (9th Cir. 1984); Siderman, 965 F.2d at 705 n.4 (noting in dictum ***one month before*** Weltover that "the exercise of personal jurisdiction also must comport with the constitutional requirement of due process"). Thus, "[t]he Ninth Circuit has since retreated from this [previous conclusion] by following the Weltover court's lead in assuming without deciding that due process was satisfied." Altmann, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001), aff'd, 317 F.3d 654 (9th Cir. 1998), aff'd, 541 U.S. 677 (2004). Moreover, in Altmann, the Supreme Court recently reiterated that Congress intended to resolve difficulties regarding the scope of federal jurisdiction over foreign sovereigns "by enacting the FSIA, a ***comprehensive statute*** containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state ***or its political subdivisions, agencies, or instrumentalities.***'" 541 U.S. at 691 (emphases added). The Court noted that FSIA itself "contains venue and removal provisions" and that "it prescribes

the procedures for obtaining personal jurisdiction over a foreign state [in] § 1330(b)." Id.

That comprehensive statute provides in plain language that subject matter jurisdiction over a case confers personal jurisdiction over the sovereign so long as the defendant is properly served. In other words, "under the FSIA, 'subject matter jurisdiction plus service of process equals personal jurisdiction'" and the "Due Process Clause imposes no limitation on a court's exercise of personal jurisdiction over a foreign state." Abur v. Republic of Sudan, No. 02-1188 (JDB), 2006 U.S. Dist. LEXIS 49432, at *13 & n.11 (D.D.C. July 10, 2006) (quoting Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987)). Nothing in the Act suggests that a minimum contacts analysis must be conducted or that foreign sovereigns should be viewed as "persons" for purposes of a due process analysis. Explaining why a court need look no further than the FSIA's statutory mandate, Judge Cooper, in the Altmann District Court decision, wrote:

> The personal jurisdiction requirement recognizes an individual liberty interest that is conferred by the Due Process Clause. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). The personal jurisdiction requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Id. It would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States. Flatow[v. Islamic Republic of Iran, 999 F. Supp. 1, 21 (D.D.C. 1998)]. Accordingly, this

> Court holds that a foreign state is not a 'person' under the Due Process Clause of the United States Constitution.
>
> The previously-cited House Report's language is unambiguous -- it states that in personam jurisdiction has been addressed within the requirements of the statute; the FSIA does not grant a liberty interest for the purposes of substantive due process analysis. H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code & Admin. News at 6611-12. This Court joins with the Flatow court's observation that foreign sovereign immunity, both under the common law and now under the FSIA, has always been a matter of grace and comity rather than a matter of right under United States law. Verlinden[B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983)], citing Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812). Where neither the Constitution nor Congress grants a right, it is inappropriate to invent and perpetuate it by judicial fiat.

142 F. Supp. 2d at 1208; see also Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96-100 (D.C. Cir. 2002) (detailing why and holding that foreign states should not be considered "persons" protected by the Fifth Amendment); Rux, 2005 U.S. Dist. LEXIS 36575, at *54.

The Court agrees with the reasoning of these courts and, based on the foregoing, concludes that the question of personal jurisdiction in this case turns on whether or not the Court has subject matter

jurisdiction, and that the answer to that question is a matter not of constitutional law but of statutory construction. Accordingly, given the current posture of this case, the Court must determine the meaning of the statutory requirement that a foreign instrumentality be engaged "in a commercial activity in the United States" as a condition to applying the illegal expropriation exception to sovereign immunity.

C. SUBJECT MATTER JURISDICTION

The expropriation exception to sovereign immunity set forth in 28 U.S.C. § 1605(a)(3) applies in situations where the following four conjunctive elements are present:

> (1) that rights in property[] are at issue,
>
> (2) that the property was "taken,"
>
> (3) that the taking was in violation of international law, and
>
> (4)(a) "that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is ***engaged in a commercial activity in the United States***"

Garb, 440 F.3d at 588 (emphasis added). The first and second prongs of this test are settled since there is no dispute that the Painting was taken from Ms. Cassirer. This leaves the Court with the remaining two elements to analyze.

1. "In Violation of International Law"

As noted above, the Court has already determined that the Complaint alleges that property was taken in violation of international law and that the statutory exception permits suits to be brought against foreign sovereigns even if the sovereign, like Spain in this case, had no involvement in the initial illegal taking. In addition, and as also articulated above, the element does not fail on the grounds that the Painting was taken by Scheidwimmer or because it was taken from Ms. Cassirer who was not considered a citizen by the government that took the property.

According to Spain, however, this "in violation of international law" element is nonetheless not satisfied since the alleged extortion of the Painting by an official appraiser and agent of the Nazi government in exchange for an exit visa out of Germany (and her life) and $360 that Ms. Cassirer would never see since it was deposited into a blocked bank account does not constitute a violation of international law.[4]

To make this point, Spain relies heavily on Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), a case in which the DEA hired Mexican nationals to abduct a Mexican doctor, who had been indicted for the murder and torture of a DEA agent, and to deliver him to the custody of federal agents in the United States. After the doctor prevailed in the criminal case, he sued the United States and several individuals in federal court

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[4] At the hearing the Foundation indicated that it takes no position on whether the initial taking of the Painting violated international law.

for, among other things, false arrest and detention. Construing the Federal Tort Claims Act and the Alien Tort Statute, the Supreme Court held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." Id. at 738. Spain (though not the Foundation) suggests that this case has articulated a new standard for assessing what it means to violate international law, and that the Siderman test is no longer controlling.

The argument is unpersuasive because neither the Alien Tort Statute nor the Federal Tort Claims Act are at issue, and nothing in those statutes or their construction provides any help in construing the provisions of Section 1605(a)(3). Moreover, Sosa focused exclusively on those circumstances under which a detention constitutes a violation of international law, since those questions are not resolved by statute. But here the Court is dealing with a statute where Congress has expressly provided for jurisdiction over claims arising from "property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Sosa provides no guidance in determining the meaning of that phrase.

FSIA cases, on the other hand, have examined the meaning of the phrase and, drawing from the Restatement of Foreign Relations law, have held that "[i]f a taking violates any one of the [following] proscriptions, it violates international law." Siderman, 965 F.2d at 712. These proscriptions include "injury resulting from: (1) a taking by the state of the property of a national of another state that[:] (a) is not for a

public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation . . . ." Id.; Altmann, 317 F.3d at 968 ("[T]he Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law."); see also West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 (9th Cir. 1987); Greenpeace, Inc. (U.S.A.) v. France, 946 F. Supp. 773, 783 (C.D. Cal. 1996).

Looking to this standard, the Court concludes that the taking was discriminatory and without just compensation. Indeed, the Nazis stripped the Jews of their citizenship and took their property, including the Painting in this case. The $360 provided for the Painting now allegedly worth many millions of dollars was not just compensation, especially when the payment is viewed in conjunction with the allegation that Ms. Cassirer could never even withdraw the funds since they were paid into a blocked bank account, thereby effectively receiving nothing for the Painting. In any event, "[a]t th[is] jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a 'claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.'" Siderman, 965 F.2d at 711 (citation omitted); Altmann, 317 F.3d at 958-59 (finding the plaintiff's allegations, which arise from very similar facts, to satisfy the jurisdictional requirement); Greenpeace, Inc. (U.S.A.), 946 F. Supp. at 782. The Court is more than satisfied that, at this point, Plaintiff has made the required showing.

2. "ENGAGED IN A COMMERCIAL ACTIVITY IN THE UNITED STATES"

The final question presented in the jurisdictional analysis is whether Spain and/or the Foundation are engaged in "a commercial activity in the United States" within the meaning of the statute, in which case the expropriation exception applies and the litigation may proceed in this Court. The Court concludes that this element is also satisfied as to both Defendants.

The statute defines commercial activity as follows:

> A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).[5] Case law further explains that, regardless of the motive behind a particular activity, that activity is "commercial" if it is the type through which a private party engages in trade or commerce. Weltover, 504 US. at 614; Tei Yan Sun v. Taiwan, 201

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[5] Subsection (e), which defines "commercial activity carried on in the United States by a state," relates to the exception set forth in 28 U.S.C. § 1605(a)(2) and a disjunctive prong of 28 U.S.C. § 1605(a)(3) which requires property to be present in the United States. As to those provisions, 28 U.S.C. § 1603(e) requires commercial activity "carried on by such state having substantial contact with the United States." Subsection (e)'s requirements, however, are not at issue here.

F.3d 1105, 1107 (9th Cir. 2000); Malewicz, 362 F. Supp. 2d at 313. Thus, the establishment of a tariff would be a sovereign act because private parties do not regulate foreign trade, but contracting to purchase boots for an army would be a "commercial activity" because it is the type of conduct in which private parties may engage. Altmann, 142 F. Supp. 2d at 1204.

The statutory language imposes no requirement that the commercial activity relate in any way to the illegally expropriated property. Nor does it even suggest that the exception applies only where the foreign sovereign is engaged in continuous and systematic commercial activity within the United States. On the contrary, Section 1603(d) defines "commercial activity" to include ***either*** a regular course of conduct ***or a*** particular transaction or act. And despite the contention of Defendants, the Court is not limited to a consideration of the foreign instrumentality's commercial activities that occur entirely within the United States. The legislative history cited by Defendants that supposedly supports such a limitation suggests otherwise:

> As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business

> torts occurring in the United States (cf. Sec. 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States -- for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States.

H.R. Rep. No. 94-1498 at 17, as reprinted in 1976 U.S.C.C.A.N. at 6615-16.

Case law supports the Court's conclusion that limited commercial activity is sufficient to bring this case within the expropriation exception to sovereign immunity. For example, on this question of "commercial activity," the Ninth Circuit in Altmann explained:

> Because Appellants profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute 'commercial activity' for the purpose of satisfying the FSIA, as well as the predicates for personal jurisdiction.

317 F.3d at 959. The court explained that these commercial contacts "***far exceed[]*** that which we[re] found sufficient to justify applying § 1605(a)(3) in Siderman." Id. at 969 (emphasis added). The court noted that "[t]he key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and

marketing of that exhibition and the books [such as *Klimt's Women*] in the United States." Id. Moreover, it was the activity of selling the books, and not the appearance of the particular paintings in the books, that warranted the exercise of jurisdiction. Thus, while three of the Klimt paintings were not featured in *Klimt's Women*, which was published in English and distributed in the United States, the court found jurisdiction to exist over the dispute as to all six paintings.

While the contacts in Altmann far exceeded the minimum commercial contacts sufficient to warrant the exercise of jurisdiction, Siderman found jurisdiction in a case that involved a much lower level of "commercial activity." In Siderman the plaintiffs, a Jewish family residing in Argentina in the 1970s, were persecuted, tortured, harassed, and forced to leave the country by an anti-semitic military junta that seized control of the government. After one member of the family was severely tortured over a period of several days, he was told to leave the country or he and his family members would be killed. The family quickly gathered what they could, made arrangements to have someone oversee their family business, which included the Hotel Gran Corona in Tucuman, Argentina, and fled to the United States. Thereafter, the Argentine dictatorship altered the family's real property records to show that the Sidermans had owned not 127,000 acres, but 127 acres of land in the province and ultimately seized the family business through a sham judicial proceeding. Some years later, the family, one of whom was a United States citizen, brought suit in federal court asserting, among other things, that the court had subject matter jurisdiction under the expropriation exception to the FSIA. Siderman, 965

F.2d at 703. As to that exception, the Ninth Circuit noted that Argentina had undertaken operation of the Hotel Gran Corona, that is solicited and entertained American guests at the hotel, and accepted their credit cards and traveler's checks in payment for the costs of lodging. This was enough for jurisdictional purposes "to show that Argentina is engaged in ***a commercial activity*** in the United States." Id. at 712 (emphasis added). This was the only commercial contact the court relied on in concluding that the plaintiffs properly had alleged facts to invoke the expropriation exception. Even though the court "emphasize[d] the preliminary nature" of the holding, pending further development of the factual record, it was sufficient to satisfy the plaintiff's initial burden. Id. at 712-13. Here, however, Defendants have been permitted to rebut Plaintiff's allegations of jurisdiction, and their attempts to argue that the Foundation's or Spain's contacts are strictly sovereign are unpersuasive and simply unsupported given the case law on this point.[6]

The Court concludes that while the commercial activity presented in this case falls somewhere below

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[6] Notably, the Siderman court also found the following contacts sufficient to satisfy Section 1603(e)'s more rigorous "substantial contact with the United States," 28 U.S.C. § 1603(e), which is a heavier burden than what Plaintiff here carries under 28 U.S.C. § 1603(d):

> Argentina advertises the Hotel Gran Corona in the United States and solicits American guests through its U.S. agent, Aerolinas Argentinas, the national airline of Argentina. They have alleged further that numerous Americans have stayed at the Hotel, which accepts all the major American credit cards, including Mastercard, Visa, and American Express.

Siderman, 965 F.2d at 709.

what was found to "far exceed[]" the threshold in Altmann, it is sufficient at this point to invoke the expropriation exception. That is, after reviewing the evidence from the grant of jurisdictional discovery, the Court finds the following commercial activity in this case.

a. The Foundation's Purchases and Sales in the United States[7]

The Foundation has engaged in commercial transactions in the United States, both as a purchaser and a seller. For example, as a buyer, it has entered into media licensing agreements with United States museums (e.g., Maxon Decl., Ex. A [Compendium of the Foundation's Commercial Purchases] at Bates 0125-28, 0168-70, 0174-75), and has entered into dozens, if not hundreds of transactions with United States businesses to purchase posters, post cards, and related materials. (See generally e.g. id., Ex. A [Compendium of the Foundation's Commercial Purchases]). Likewise, the Foundation has used its credit card in the United States to purchase books from Amazon.com and book stores in New York and California. (See, e.g., id. at Bates 0442, 0476). As particularly ironic examples, the Foundation purchased through Amazon.com The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest

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[7] The Court briefly notes that if the Foundation – an alleged agency and instrumentality of Spain – has sufficient commercial contacts to satisfy "a commercial activity" as set forth at the end of 28 U.S.C. § 1605(a)(3), then those contacts are also sufficient to hold Spain to answer under this exception because a foreign ***state*** is not immune is when a foreign state's agency or instrumentality is engaged in "a commercial activity."

Works of Art, (Maxon Decl., Ex. A [Compendium of the Foundation's Commercial Purchases]; id. at Bates 0442), purchased the art book "Abe 566 Pisarro [sic]" from Warren Art Books in New Jersey, (id. at Bates 0512), and from the American Association of Museums in Washington, DC purchased a volume on Museum Policy and Procedure for Nazi Era Issues, (id. at Bates 0471).

As a seller, the Foundation has sold to United States residents and business posters and books, and has licensed the reproduction of images to various United States businesses. (Id., Ex. C [Compendium of the Foundation's Commercial Sales] at Bates 0677 (Receipt for sale of Pissarro poster to individual residing in Wichita, Kansas)). Even more important is ***a purchase by an individual in the Central District of California of a poster of the Pissarro Painting charged to her American Express credit card***. (Id., Ex. C [Request and Sale of Pissarro Poster] at Bates 584-85; see also id. at Bates 709 (Receipt for sale from Foundation of Pissarro poster to individual residing in Winston-Salem, North Carolina)). The Foundation communicated with American purchasers through e-mail communications (e.g., id. at Bates 0713, 0715), and sold copies of its Thyssen-Bornemisza Collection Guide. (Id. at Bates 0715.) Finally, while it is difficult definitively to confirm based on the submitted evidence, Plaintiff alleges that several catalogues and publications containing copies of the Painting were also sold by the Museum. (Id. at Bates 0671, 0705, 0721; Opp. to Foundation Mot. at 14 n.4).

Indeed, the Foundation admits that "in limited circumstances, [it] has worked with entities in the United States to provide goods or products to be sold in

the Museum gift shop [and] from time to time[] has ***paid citizens of the United States to write essays for [its exhibition] catalogs***." (Maxon Decl., Ex. B [Response to Interrogatories] No. 3 (emphasis added)). Moreover, the Foundation admits that the "Museum's gift shop sells items to any visitors, and has . . . shipped items [to] the United States." (Id.).

b. The Foundation's Retention of Services in the United States

The Foundation has commissioned services for its Museum by individuals in the United States, such as the purchase of an essay for one of its exhibitions, (e.g., id., Ex. D [Compendium of the Foundation's Purchased Services] at Bates 0273 , and the solicitation, recruitment, and invitation of an individual at the Institute of Fine Arts in New York to lecture at the Foundation's Museum, (id. at Bates 0366-70). Indeed, there is evidence of several other such recruitments and speaking engagements in exchange for the Foundation's payment to these individuals.

c. The Foundation's Granting Permission for Filming in the Museum which Resulted in Iberia Airlines Featuring a Video and Discussion About the Painting on Flights between the United States and Spain

There is undisputed evidence that the Foundation gave permission to Transvision, a video production company, to film a program in the Museum. (7/6/06 Henestrosa Decl. ¶ 14). As a result of that granted access, an "Artemario" in-flight program on the Spanish Iberia Airlines flights between Spain and the United States features the precise Camille Pissarro

Painting at issue herein. (Lee Rappaport Decl. ¶ 4; John Rappaport Decl. ¶ 4). The in-flight program depicts the Painting, which is identified by the painter, Camille Pissarro, in the Foundation's Museum and the DVD contains a lengthy five-minute explanation of the Painting, its history, its location in the Museum, and discussion about Pissarro himself. (Not. of Lodging, Ex. F [Programa Iberia In & Out – Pissarro]).

Iberia Airlines maintains that while there is no formal agreement or contract with the Foundation or Museum, these entities "are aware that the programs are aired on [its] intercontinental flights." (Maxson Decl., Ex. I [E-mail Communication with Iberia Airlines] at p. 676). As a result, several tens – if not hundreds – of thousands of airline passengers viewed the Pissarro presentation on at least 200 flights between the United States, which no doubt serves as a powerful marketing tool to entice U.S. tourists aboard these Iberia flights to visit the Foundation's museum while visiting Spain. (Maxson Decl., Ex. J [E-mail Communication from Iberia Airlines]). There is evidence that over 34 artworks from the Museum's collection – including the Painting itself – have each been the subject of an "Artemario" program on Iberia Airlines. (Pollan Decl. ¶¶ 3-4).

d. Marketing and Commercial Promotion in the United States

The Foundation has regularly advertised several of its exhibitions in internationally distributed art magazines, including those circulated in the United States. (Maxson Decl., Ex. L [The Museum's Advertising Contacts] at Bates 0001-02). Moreover, there is evidence that exposition notices were also sent

to other international news publications such as Newsweek and Time Magazine, and that the Foundation advertises in the New Yorker. (Id. at Bates 0042). Many of these notices were also sent to Spain's various tourism offices located throughout the United States, including in Beverly Hills, California. (Id. at Bates 0038-39). The Foundation admits that it mails its Museum bulletin entitled "Perspectives" to addresses throughout the world, including 55 in the United States, and two in the Central District of California. (7/6/06 Henestrosa Decl. ¶10).

In addition, while it is unclear who paid for the advertisements and the Foundation denies having done so, (8/14/06 Hearing Tr. at 12-13), several advertisements of the Foundation's Museum were taken out in the New York Times. The advertisements provided the location of local tourist offices in the United States, their contact information along with Iberia's contact information, and the advertisements mention the Museum itself and encourage visitors to visit Spain and these tourist attractions there. (Maxson Decl, Ex. S [11/10/03 New York Times Advertisement] at p. 905-07). Specifically, the advertisements state: "If you love art and culture, Madrid is your destination. . . . [A] unique itinerary [] takes you from El Prado to the Thyssen-Bornemisza [Museum]. . . Come and experience their genius." (Id.) These contacts only reinforce a finding of a commercial activity.

e. Other Non-Sovereign Commercial Activities in the United States

While the Foundation has never loaned the Painting to a museum in the United States,

(Henestrosa Mot. Decl. ¶ 17), the Foundation has borrowed and borrows artworks from individuals and institutions in the United States. (Id. ¶ 16). In fact, some agreements even charged the Foundation a fee for the loans, albeit a nominal $200. (See, e.g., Maxson Decl., Ex. Q [Compendium of Borrowers' Loan Agreements] at Bates 1159). This evidence exists, even in the face of Henestrosa's declaration that "[t]he Foundation does not receive payment for the loan of its artworks or pay to borrow artworks from others." (Henestrosa Mot. Decl. ¶ 16). Many of the artworks borrowed by Spain fetched hundreds of thousands of visitors a year. (Maxson Decl., Ex. Q [Compendium of Borrowers' Loan Agreements] at Bates 2050-51). While Henestrosa maintains that these "exchanges are reciprocal educational and cultural activities designed to promote the international understanding and appreciation of art," (Henestrosa Mot. Decl. ¶ 16), as the Court has already explained, the purpose is not relevant in assessing commercial activity. Altmann, 317 F.3d at 969. Indeed, the Malewicz court held that the loan of paintings to museums in the United States – albeit the same paintings that were at issue there – constituted a commercial activity since "[t]here is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." Malewicz, 362 F. Supp. 2d at 314. The Court explained that "because the international loan of artworks between museums can and does occur with potential sales of the works contemplated by the parties (which is undoubtedly 'commerce' in the traditional sense), and because it is the type of activity -- not its purpose – that must guide the analysis," the city's argument that the "exchange of artworks between not-for-profit organizations in different countries" was not commerce must fail. Id.

The Foundation has also loaned many of its artworks to institutions in the United States and similarly charged nominal, administrative fees associated with the loans. (See, e.g., Maxson Decl., Ex. R [Compendium of the Foundation's Loan of Artwork] at Bates 0955 (Foundation Loan to the Metropolitan Museum of Art)).

Other commercial activities exist. Through the Museum's website, www.museothyssen.org, U.S. citizens may sign up for newsletters, view the Foundation's collection - including the Pissarro Painting – and purchase advance admission tickets through links to third-party vendors. (Henestrosa Mot. Decl. ¶¶ 14-15).

Finally, as they relate directly to Spain, the Foundation's motion and Henestrosa's declaration assert that "none of the tourism offices' materials depict, mention, or feature the Painting." (Foundation Mot. at 10; Henestrosa Mot. Decl. ¶ 12). However, the Court's review of the record reveals that at least one Museum brochure distributed by Spain's Beverly Hills tourism office mentions Pissarro by name. (Paxson Decl., Ex. M [Brochures] at Bates 0015-18, Defs.' Bates 725-28; Cabanas Decl. ¶ 6). Moreover, as recently as this month the New Yorker magazine, in a "special advertising section," featured the Museum itself and a discussion of the Baron's collection. (8/17/06 Hall Decl., Exs. A [7/31/06 New Yorker Magazine] & B [8/7/06 - 8/14/06 New Yorker Magazine]).

f. Conclusion re: Commercial Activity

The Court concludes that Defendants have engaged such numerous commercial contacts with the United States that the "commercial activity" element of the expropriated property exception is easily established. While Altmann had more direct publications in the U.S. of at least some of the paintings at issue, here there are sales to United States residents of reproductions of the Painting, (e.g., Maxson Decl., Ex. C [Request and Sale of Pissarro Poster] at Bates 0584-85; see also id. at Bates 0709), and hundreds of other contacts involving the purchase and sale of merchandise as described above, some of which are directly related to Pissarro and even the Painting itself. The Court's conclusion is consistent with the legislative history of the FSIA, which explains that "[p]aragraph (c) of section 1603 defines the term 'commercial activity' as including a broad spectrum of endeavor, ***from an individual commercial transaction or act*** to a regular course of commercial conduct." H.R. Rep. No. 94-1498 at 16, as reprinted in 1976 U.S.C.C.A.N. at 6614 (emphasis added). As such, the evidence submitted is more than sufficient to support Plaintiff's contention that there exists "*a* commercial activity" for purposes of 28 U.S.C. § 1605(a)(3). See Adler, 107 F.3d at 725 (for purposes of 28 U.S.C. § 1605(a)(2), Nigeria engaged in commercial activity within the meaning of section 1603(d) by entering into "an agreement" for the assignment of a contract in exchange for consideration).

g. The Policy Question

In the end, Defendants argue against the Court's conclusion through predictions of doom and gloom if the statute is not construed more narrowly. The Court's ruling, they say, will convert the federal district courts into international courts of claim for those seeking recovery of property looted by the Nazi regime. The argument contains several flaws.

First, the issue now before the Court is not about jurisdiction over all illegally expropriated property but rather about such property that is in the hands of a foreign sovereign. The statutory limits placed on the exercise of jurisdiction – that the property have been taken in violation of international law, that it be in the hands of a foreign sovereign, and that the sovereign be engaged in a commercial activity in the United States – suggest that the number of such cases is likely to be small. The Court finds more traction on this supposed slippery slope than do Defendants. But even if the statute opens the courthouse up to a large volume of international litigation, that result flows directly from the language of the statute, which reflects Congressional policy. For the Court to construe the statute to mean something other than the meaning suggested by its text would be to substitute the Court's policy determination for that of Congress. Policy questions, especially in an area that involves foreign relations, should be decided by the political branches of government. See Patsy v. Bd. of Regents, 457 U.S. 496, 513 (1982) (exhaustion context) (superseded on other grounds) ("The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.").

Thus, this Court believes "[a]s judges, of course, we must apply statutes as written, not as they should have been written with the benefit of hindsight." Gardenhire v. IRS (In re Gardenhire), 209 F.3d. 1145, 1152 (9th Cir. 2000) (policy decisions should be left to Congress). If experience teaches that the statute as written overburdens the Court with suits brought against foreign sovereigns under the expropriation exception, then Congress, with the benefit of that experience, can amend or re-write the statute. The Court doubts that this will be necessary.

Thus, while this case presents the Court with the novel situation where the foreign sovereign has had no role in the illegal taking of the property in dispute and its commercial activities in the United States have only occasionally related to that property, the Court concludes that the statute confers jurisdiction over the subject matter of the lawsuit. Since Plaintiff "offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." Siderman, 965 F.2d at 708; accord Randolph v. Budget Rent-A-Car, 97 F.3d 319, 324 (9th Cir. 1996). The Court holds that Plaintiff has satisfied this burden and Defendants have not rebutted this presumption, and therefore there exists a substantial, nonfrivolous basis for this Court's exercise of subject matter jurisdiction under 28 U.S.C. § 1605(a)(3) of the FSIA.

D. VENUE

Pursuant to the FSIA statute:

> A civil action against a foreign state . . . may be brought . . . (3) in any judicial district in which the agency or instrumentality is licensed to do business or ***is doing business,*** if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title [28 USCS § 1603(b)]; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1391(f) (emphasis added); see also Altmann, 317 F.3d at 972. Despite Defendants' arguments to the contrary, venue in this District is proper pursuant to this section since Defendants are "doing business" in this District and the finding that Defendants are engaged in "a commercial activity" in the United States is sufficient to satisfy the FSIA's venue provision. (Compl. ¶ 13); Altmann, 142 F. Supp. 2d at 1215 aff'd, 317 F.3d at 971-72 (venue in the Central District is proper as to both the foreign state defendant and its alleged agent and instrumentality). Here, the commercial activity contacts aside, two residents of this District viewed the Pissarro "Artemario" program on the Iberia Airlines flight, a local resident ordered and purchased a copy of the Pissarro Painting from the Museum, which was charged to the U.S. resident's American Express card and shipped to this District, (Maxson Decl., Ex. C [Request and Sale of Pissarro Poster] at Bates 0584-85), and the Foundation sends its bulletin "Perspectives" to at least two residents of the District,

(7/6/06 Henestrosa Decl. ¶ 10). Thus, the Foundation's claims that it is not "doing business" in the Central District are unfounded. (See Foundation Mot. at 14). Altmann's reasoning is persuasive:

> Because the publications and advertisements of the Austrian Gallery that form the basis for jurisdiction under the FSIA have been distributed in the Central District of California, we hold that the Austrian Gallery, an agency or instrumentality of Austria, is 'doing business' in the district and that venue is therefore proper in the Central District under § 1391 (f)(3).

317 F.3d at 972. The Court holds that venue in this District is proper in this case as well.

E. Spain's Motion to Dismiss for Failure to State a Claim

The final issue is Spain's motion to dismiss under Rule 12(b)(6). Spain claims that Plaintiff fails to allege that Spain has done anything improper and it is not alleged that "Spain is currently an owner or possessor of the Painting." (Spain Mot. at 18).

Given the foregoing analysis, Spain cannot prevail on this motion. First, as to the declaratory relief action, Plaintiff has alleged a "case or controversy" against Spain since it is alleged – and in fact admitted by the Foundation – that the Foundation is an agent or instrumentality of the Spanish government, and that the Foundation possesses and purports to own the Painting which Plaintiff claims is rightfully his.

Second, Plaintiff's claim for a constructive trust requires: "(1) the existence of res (property or some interest in property); (2) the right of the complaining party to that res; and (3) some wrongful acquisition ***or detention of the res by another party*** who is not entitled to it." In re Real Estate Assocs. P'ship, Litig., 223 F. Supp. 2d 1109, 1140 (C.D. Cal. 2002) (emphasis added). Spain's own cited case makes clear that wrongful detention of the res by another party is sufficient for purposes of the imposition of a constructive trust. As such, Spain's argument fails given the allegations in the Complaint.

Third, Plaintiff asserts a claim for conversion, which is defined as "the wrongful exercise of dominion over the property of another." Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1066 (Ct. App. 1998). "The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." Id. Spain contends that Plaintiff has not alleged that Spain exercises any dominion or control over the Painting. This slight distinction, however, is immaterial since the Complaint clearly alleges – and the Foundation admits – that the Foundation is an agent or instrumentality of Spain. Moreover, Spain's actions directly contradict its argument since at this point it is undisputed that in 2001 Plaintiff asked Spain's then Minister of Education, Culture and Sports, Pilar del Castillo Vera, for the Painting's return and the request was refused. (Compl. ¶ 32). Thus, at this stage the allegations and factual assertions are sufficient to support a claim that Spain exercises dominion and control over the Foundation and hence the Painting.

Finally, Plaintiff asserts a claim for possession of the Painting, which is essentially a claim for replevin under the common law term. "In federal courts, replevin is a remedy specifically approved by rule, as governed by the appropriate state law." Adler v. Taylor, No. CV 04-8472 (RGK), 2005 US. Dist. LEXIS 5862, at *8 (C.D. Cal. Feb. 2, 2005). "For specific recovery, Plaintiff[] only need show (1) a right to possession of the property, and (2) [the defendant's] wrongful possession." Id. at, *9 (citations omitted). Replevin is simply a remedy for conversion and when a complaint "supports a conversion claim, it also supports a specific recovery remedy." Id. Therefore, because the Court concludes that Plaintiff has stated a claim for conversion, Plaintiff's request for replevin also survives. Thus, Spain's motion to dismiss for failure to state a claim is **DENIED**.

III.

CONCLUSION

The Court concludes that Plaintiff properly has alleged and supported with jurisdictional discovery a "non-frivolous" claim that the expropriation exception to the FSIA applies such that this Court has subject matter jurisdiction over the case as to both Defendants. Moreover, the Court has personal jurisdiction over both Defendants under the express terms of the FSIA, 28 U.S.C. § 1330(b). In addition, following controlling authority from this Circuit, the Court holds that venue in this District is proper. Finally, and largely based on the foregoing analysis, Plaintiff's causes of action do not fail to state a claim for relief against Spain. Therefore, Defendants' motions are **DENIED**, and given the controlling

questions of law presented for which there is substantial ground for difference of opinion, this Order is hereby **CERTIFIED** for appeal pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

DATED: August 30,2006

/s/ Gary Feess
Judge Gary Allen Feess
United States District Court

APPENDIX D

28 U.S.C. § 1602

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity–

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1604

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any

withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an

agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub. L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341.

No. 10-786

Supreme Court, U.S.
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In The

Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,

Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PARTIES TO THE PROCEEDINGS

Respondent adopts petitioners' List of Parties, and notes that Beverly Cassirer, Claude Cassirer's widow, has been appointed Personal Representative of Claude Cassirer's estate. Respondent has moved in the court of appeals to substitute her as plaintiff in her representative capacity; petitioners have not opposed the motion.

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STATEMENT OF THE CASE

Under Section 1605(a)(3) of the Foreign Sovereign Immunities Act (the "FSIA"), a foreign state or instrumentality is not entitled to sovereign immunity if "rights in property taken in violation of international law are in issue and . . . that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). This case presents two questions: (1) whether the Court should rewrite Section 1605(a)(3) to insert the words "by the foreign state" after "taken in violation of international law," so that the statute would require the defendant foreign state to have taken the property at issue; and (2) whether the Court should insert a mandatory, jurisdictional exhaustion requirement into Section 1605(a)(3), notwithstanding the possibility that courts can already require exhaustion as a prudential matter. The Ninth Circuit refused to take either step, deciding instead to adhere to the statute as written. It then remanded the case for further proceedings to determine whether petitioners should be required to return a painting in their possession that the Nazis stole from the grandmother of Respondent Claude Cassirer.

A. Factual Background

1. Camille Pissarro completed *Rue Saint-Honoré, après-midi, effet de pluie* (the "Painting") in

1897. His representative, Durand-Ruël, sold it in 1898 to Julius Cassirer. The Cassirers were a well-known and highly regarded Jewish family that played a leading role in Germany's economic and cultural life until the Nazis drove them from the country in the 1930s. When Julius Cassirer died in 1924, his son, Fritz Cassirer, and Fritz's wife, Lilly, inherited the Painting. Fritz and Lilly had one child, Eva, who in turn had one child, Claude Cassirer. Eva Cassirer died in an influenza epidemic in 1921 when Claude was four months old. Claude was raised largely by his grandmother, Lilly, and was Lilly's sole heir. Claude Cassirer has vivid memories of seeing the Painting hanging in his grandmother's parlor.

As a Jew, Lilly was subjected to increasing persecution in Germany after the Nazis seized power in 1933. By 1939, Lilly felt she had no choice but to flee Germany. Lilly had to obtain official permission to leave Germany and to take any property of value with her. A Nazi agent told Lilly that she could not take the Painting out of Germany and demanded that she hand it over to him in exchange for a derisory payment of 900 Reichsmarks – about $360 at 1939 exchange rates. Although she knew that she would never be permitted to take even that nominal payment with her when she fled to England because it would be paid into a blocked bank account, Lilly surrendered the Painting as demanded.

2. Unbeknownst to Lilly, who never learned of its whereabouts before she died in 1962, the Painting was sold at auction in Berlin to an anonymous

purchaser in January 1943. The Painting next turned up in 1952, when a New York gallery sold the Painting to a private collector in St. Louis. In 1976, Baron Hans-Heinrich Thyssen-Bornemisza, one of the world's largest private collectors of art, purchased the Painting. Eventually Baron Thyssen-Bornemisza began looking for a permanent home for his art collection, and in 1988, Baron Thyssen-Bornemisza granted Spain a ten-year lease on his collection in exchange for approximately $50 million.

In 1993, Spain co-founded the Thyssen-Bornemisza Collection Foundation (the "Foundation") and gave it 42,277,120,000 Pesetas – more than $327 million – to purchase the Thyssen-Bornemisza collection, including the Painting. Spain also spent millions of dollars to refurbish a palace it owned, the Villahermosa Palace, and provided it to the Foundation at no charge as a home for the Thyssen-Bornemisza Museum. If the Foundation ceases to use the Palace to house the collection, the Palace will revert to Spain, and if the Foundation ceases to exist, Spain will become the owner of the Thyssen-Bornemisza collection.

At least two-thirds of the directors on the Foundation's Board must be representatives of the Spanish government, nominated and removed freely by the government through royal decree. In fact, four of the governmental directors of the Foundation serve by virtue of their high positions in the Spanish government: Spain's Minister of Culture, its Secretary of State for Culture, its Secretary of State for Budget

and Expenses, and its Undersecretary of Culture, are all ex officio members of the Foundation's Board.

B. Procedural History

1. In 2000, Mr. Cassirer discovered that the Painting was in the Thyssen-Bornemisza Museum. After Spain and the Foundation refused his repeated requests to return the Painting, Mr. Cassirer sued them in the United States District Court for the Central District of California to recover it or, alternatively, to obtain damages to compensate for petitioners' conversion. Mr. Cassirer founded subject matter jurisdiction on Section 1605(a)(3) of the FSIA, which, as noted above, allows a plaintiff to sue a foreign state and its instrumentality when "rights in property taken in violation of international law are in issue," and if the instrumentality "own[s] or operate[s]" the property and "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

Petitioners moved to dismiss Mr. Cassirer's claims, primarily on the grounds that they were entitled to sovereign immunity because Section 1605(a)(3) did not apply for five reasons. First, petitioners claimed that Section 1605(a)(3) requires the defendants themselves to have taken the property at issue in violation of international law. Second, petitioners asserted that Section 1605(a)(3) requires plaintiffs to exhaust available remedies in other countries as a mandatory jurisdictional prerequisite. Third, petitioners claimed that the Foundation did not engage in "a commercial

activity in the United States," as required by Section 1605(a)(3). Fourth, Spain argued that the Painting was not taken in violation of international law because the Nazi appraiser who forced Lilly Cassirer to sell the Painting was not a state actor. Fifth, Spain asserted that because Lilly was a German national, the Nazis' taking of the Painting from her as part of its campaign of genocide against Jews did not violate international law.[1]

In addition to sovereign immunity, petitioners sought dismissal on the grounds that personal jurisdiction was lacking and venue was improper because the Foundation did not engage in sufficient commercial activity in the United States.[2] Lastly, Spain argued that no case or controversy existed, and moved to dismiss under Rule 12(b)(6) for failure to state a claim, because Mr. Cassirer did not allege any actions by Spain or that Spain owns the Painting.

The district court rejected petitioners' sovereign immunity arguments. Agreeing with the only other federal court opinions ever to have addressed the issue, the district court held that Section 1605(a)(3) does not require the defendant foreign state itself to have taken the property in violation of international law. Pet. App. 104a. The district court also held that the plain language of the FSIA does not contain any

[1] The Foundation did not join in these last two arguments.

[2] Spain also argued that the District of Columbia is the proper venue pursuant to 28 U.S.C. § 1391(f)(4).

mandatory exhaustion requirement. *Id.* at 107a-108a. To hold that the Foundation engaged in "a commercial activity in the United States," the district court cited the voluminous evidence of the Foundation's contacts with the United States, including the purchase of a poster of the Painting by an individual residing in the Central District of California and the use of the Painting in a promotional video shown on Iberia Airlines flights between the United States and Spain. *Id.* at 121a-133a. Last but not least, the court held that the Nazi appraiser who forced Lilly Cassirer to sell the Painting in order for her to leave Germany was an agent of the German government, and that because Germany had stripped Jews like Lilly Cassirer of their German citizenship, the taking of the Painting from her could constitute a violation of international law. *Id.* at 108a-110a.

Petitioners' other arguments for dismissal fared no better. The court held that it could exercise personal jurisdiction over petitioners pursuant to 28 U.S.C. § 1330(b), which provides that foreign states and their agencies and instrumentalities are subject to personal jurisdiction if they are not entitled to sovereign immunity and have been served in accordance with 28 U.S.C. § 1608. Pet. App. at 111a-117a. As to petitioners' venue argument, the court held that the Foundation is doing business in the Central District, making venue proper pursuant to 28 U.S.C. § 1391(f). Pet. App. at 136a-137a. The court also held that a case or controversy exists, and that Mr. Cassirer stated a claim against Spain, because Spain

controls the Foundation and the Foundation claims to own the Painting. *Id.* at 104a-105a, 137a-139a.

2. A three-judge panel of the Ninth Circuit exercised jurisdiction over three of the district court's sovereign immunity rulings[3] and affirmed the holdings that Section 1605(a)(3) does not require the defendant foreign state to have taken the property at issue and that the Foundation is engaged in "a" commercial activity in the United States, but remanded with instructions to the district court to consider whether to impose an exhaustion requirement. Pet. App. 67a-85a. Judge Ikuta concurred with the first two holdings, but dissented from the last, arguing that the FSIA does not require exhaustion. *Id.* at 85a-99a.

3. The court of appeals sua sponte ordered the case reheard en banc and, by a 9-2 vote, affirmed the district court in part and dismissed the appeal in part.

Speaking through Judge Rymer, the Ninth Circuit held that 1605(a)(3) does not require the defendant foreign state to have taken the property at issue in violation of international law. The court of appeals reasoned that the text of the statute "is written in the

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[3] Spain did not appeal the portions of the ruling holding that the Nazi appraiser who forced Lilly to sell the Painting was an agent of the German Reich, and that the taking of the Painting from Lilly could have been in violation of international law because she had been stripped of her German citizenship, nor did petitioners challenge venue on appeal.

passive voice, which 'focuses on an event that occurs without respect to a specific actor.'" Pet. App. 17a (quoting *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009)). Thus, the statute "would have to be rewritten in order to carry the meaning the Foundation ascribes to it." Pet. App. 17a. The court of appeals also reviewed the FSIA's legislative history and found nothing suggesting that Congress intended to limit Section 1605(a)(3) to claims against a foreign state that took the property. *See* Pet. App. 17a-22a.[4]

The court of appeals further held that Section 1605(a)(3) does not require the plaintiff to have exhausted remedies in a foreign country before commencing suit. In so holding, the Ninth Circuit relied on the unambiguous language of Section 1605(a)(3) and the absence of any suggestion in the legislative history that Congress intended to require exhaustion. *See* Pet. App. 30a-32a. The court of appeals, however, "went no further" than rejecting petitioners' mandatory exhaustion argument. *Id.* at 36a. It "decline[d] to consider at this stage of proceedings whether prudential exhaustion may be invoked to affect when a decision on the merits may be made." *Id.* at 38a.

As for the remainder of petitioners' arguments for dismissal (alleged lack of case or controversy and lack

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[4] The court of appeals also held that Section 1605(a)(3)'s jurisdictional nexus requirement was satisfied because the Foundation "is engaged in a commercial activity in the United States." *See* Pet. App. 25a-30a. Petitioners do not seek review of this aspect of the decision.

of personal jurisdiction), the court of appeals held that it did not have appellate jurisdiction over those issues in this interlocutory appeal. *Id.* at 9a-12a.

Two judges dissented. They did not disagree with the majority's exhaustion analysis or its dismissal of petitioners' arguments that did not go to subject matter jurisdiction, but argued that "Congress would not have intended" to deny sovereign immunity when the foreign state defendant did not take the property in violation of international law. *Id.* at 38a-39a.

REASONS FOR DENYING THE WRIT

Neither of the questions that petitioners present warrants review. The court of appeals' holding that Section 1605(a)(3) does not require the defendant foreign state to have taken the property at issue does not conflict with the holding of any federal court or with any stated policy of the State Department. The holding also involves an issue that arises extremely infrequently, and is likely to be outcome-determinative even less often. Finally, the holding faithfully interprets the plain language of the statute and is therefore correct. The court of appeals' holding that the FSIA does not require exhaustion is likewise consistent with the only other case from the court of appeals on the subject and – to the extent petitioners even challenge the court's actual holding on exhaustion here – is correct on the merits. Finally, the case's interlocutory posture counsels against granting

certiorari. If proceedings on remand show that either of the questions presented matter to the ultimate outcome of this case, or if any problems or difficulties arise in other cases as a result of the court of appeals' decision here, this Court could consider granting review at a later time.

I. THERE IS NO NEED TO REVIEW THE HOLDING THAT SECTION 1605(a)(3) DOES NOT REQUIRE THE DEFENDANT FOREIGN STATE TO HAVE TAKEN THE PROPERTY

A. The Court of Appeals' Holding Does Not Conflict With the Holding of Any Other Court

This case presents the relatively unusual situation where a defendant foreign state and its agency or instrumentality possess property that was taken in violation of international law by another state. As far as respondent can tell, this issue has arisen in only three cases besides this one in the thirty-four years that the FSIA has been on the books. Each time the question has arisen, federal district courts have held that Section 1605(a)(3) does not require the defendant to have taken the property. *See Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6, 19-20 (D.D.C. 2006), *rev'd in part on other grounds*, 528 F.3d 934 (D.C. Cir. 2008); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1109-10 (C.D. Cal. 2003); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202 (C.D. Cal.

2001), *aff'd*, 317 F.3d 953 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004). This Court ultimately granted certiorari in *Altmann*, but the defendant did not even press this issue, and this Court allowed the plaintiff's lawsuit to go forward. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004). This case is the first time an appellate court has considered whether Section 1605(a)(3) requires the defendant to have taken the property at issue, and the court of appeals' holding here is consistent with these three district court decisions and the outcome in *Altmann*.

Petitioners nonetheless contend (Pet. 15-17) that the court of appeals' holding conflicts with the reasoning in *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), and *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984). They are incorrect. In *Agudas*, the defendant did not appeal the district court's holding that Section 1605(a)(3) applied regardless of whether the defendant had taken the property. *See* 528 F.3d at 943. And the D.C. Circuit found it unnecessary to address the issue, holding instead that the defendant itself had effectively taken the property. *See id.* at 943-46, 948-50. In *Vencedora*, the Fifth Circuit likewise did not address the question presented here. Instead, it considered whether an instrumentality of the Algerian government "owned or operated" a vessel, as required in the nexus portion of Section 1605(a)(3). 730 F.2d at 204. The court specifically

noted that it was not deciding whether any property had been "taken in violation of international law." *Id.*[5]

B. The Court of Appeals' Holding Does Not Conflict With Any Stated Policy of the State Department

The State Department – and in particular its Special Envoy for Holocaust Issues – has been aware of this case since its inception, yet it has not filed any objection to Mr. Cassirer's arguments or claims, or to any of the several court rulings in Mr. Cassirer's favor. Nor did the State Department file any statements in *Agudas*, *Anderman*, or *Altmann* advocating limiting Section 1605(a)(3) to cases where the defendant foreign state took the property at issue.

Petitioners nevertheless claim that the court of appeals' decision conflicts with State Department policy, citing the policy governing when the United States government will "espouse" an expropriation claim against a foreign state on behalf of a U.S. citizen. Pet. 11. As petitioners surely must understand,

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[5] Similarly, and contrary to petitioners' claim, *see* Pet. 16 n.9, the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (the "Restatement") does not address the situation where the defendant foreign state is not the entity that took the property. The Restatement simply confirms that under the FSIA, foreign states are not immune from suits alleging that they took property in violation of international law. *See* Restatement § 455. The Restatement is silent regarding what happens when the defendant state did not take the property at issue.

however, the State Department's policy on espousal has no bearing on this case. "In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government." *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989). This is a rarely used mechanism reserved for exceptional cases in which the United States chooses to seek a diplomatic solution to an individual's case. (Even when the conditions for espousal are satisfied, whether the United States will espouse a claim is purely discretionary on its part.) Mr. Cassirer is not, however, requesting that the United States espouse his claim. Rather, he is suing in his individual capacity, as the FSIA allows him to do.

The State Department policy on espousal says nothing about how to interpret Section 1605(a)(3) of the FSIA. Indeed, the very purpose of the FSIA is to "free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)). Accordingly, the FSIA explicitly states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter," 28 U.S.C. § 1602, not by any kind of discretionary State

Department decision making. That is exactly what the court of appeals did here.

C. The Issue Has Limited Significance

The issue whether Section 1605(a)(3) denies sovereign immunity for claims against foreign states that did not take the property at issue not only has arisen extremely infrequently, it also is unlikely to arise any more often in the future. The only context in which the issue seems to arise is with respect to property stolen by the Nazis, and there is obviously a finite amount of such property. Even within that category, there cannot be much property that satisfies all of the criteria necessary to give rise to the question presented here: (1) property that is now owned by a foreign state (as opposed to a private party); (2) property (or property exchanged for such property) that is present in the United States in connection with a commercial activity, or is held by an agency or instrumentality of the foreign state that engages in commercial activity in the United States; and (3) property the foreign state, in contravention of prevailing international norms, refuses to give back to the Holocaust survivor or his or her heir, even after learning of the property's true history.[6]

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[6] Spain's rejection of Mr. Cassirer's request for the return of the Painting contrasts sharply with the attitude in the United States towards such claims: individuals and institutions in the United States have resolved 41 such claims. *See* "Resolved Stolen

(Continued on following page)

Furthermore, in the unlikely event that the issue comes up in the future, the defendants will have other, independent arguments that could very well result in the dismissal of the litigation. For starters, statutes of limitations tend to give only a limited number of years in which to bring claims for the return of stolen property. Even when those statutes are tolled by way of "discovery rules," the limitation period generally starts running from the moment the claimant has "[i]nformation or facts that are sufficient to indicate that the claimant has a claim for a possessory interest" in the property. CAL. CIV. PROC. CODE § 338. Prudential exhaustion provides another potential hurdle for plaintiffs with these claims, as the court of appeals suggested. Pet. App. 38a.

Art Claims," http://www.herrick.com/siteFiles/Publications/98000AB314D82ED6C13289319BBE9562.pdf. Indeed, many other countries (or their instrumentalities) have returned Nazi-looted art, including Austria, Canada, France, Germany, Russia, and the United Kingdom (but Spain is not among them). *Id.*

Indeed, petitioners' refusal to return the Painting is contrary to the commitments to return Nazi-looted art that Spain made when it subscribed to the 1998 Washington Conference Principles on Nazi-Confiscated Art, Resolution 1205 of the Parliamentary Assembly of the Council of Europe in 1999, the Declaration of the Vilnius International Forum on Holocaust Era Looted Cultural Assets in 2000, and, while this litigation was pending, the Terezin Declaration of the Holocaust Era Assets Conference in 2009. By joining these declarations, Spain pledged to resolve claims for the return of Holocaust looted art promptly and equitably. These principles may be found at www.lootedartcommission.com/international-principles.

This case illustrates the array of arguments a foreign state can make to squelch a lawsuit to recover Nazi loot. Petitioners filed motions to dismiss in the district court asserting defenses wholly independent of sovereign immunity, including no case or controversy, failure to state a claim, lack of personal jurisdiction, and improper venue.

D. The Court of Appeals' Holding Is Correct

The Ninth Circuit correctly held that Section 1605(a)(3) does not require petitioners themselves to have taken the Painting in violation of international law. Section 1605(a)(3) provides that a foreign state is not entitled to sovereign immunity "in a case . . . in which rights in property taken in violation of international law are in issue." The plain language of this statute – specifically, the reference in the passive tense to the property having been "taken" – requires only that property was taken in violation of international law; it does not specify who must have taken the property.

Petitioners claim, however, that the statute is "ambiguous" because it does not "expressly say that the property must have been taken 'by *any* foreign state.'" Pet. 18. Yet this Court's precedent makes clear that such words are unnecessary when Congress employs the passive voice. "The passive voice focuses on an event that occurs without respect to a specific actor." *Dean v. United States*, 129 S. Ct. 1849, 1853

(2009); *see also Watson v. United States*, 552 U.S. 74, 81 (2007) (holding that the statutory phrase "to be used" demonstrates "agnosticism . . . about who does the using"). If Congress had intended to limit jurisdiction to situations in which the defendant foreign state itself took the property, it would have inserted the words "by the foreign state" in the statute, right after "international law."

Nor is there is any good reason to deviate from the plain meaning of the statute. Petitioners contend that the court of appeals' holding "violates common law," which "broadly" affords immunity to foreign states unless they took property themselves. Pet. 24-25. But one of Congress's purposes in enacting the FSIA was to codify the "restrictive theory" of sovereign immunity, under which a state is granted immunity for its sovereign acts, but not for its commercial or private acts. *Altmann*, 541 U.S. at 689-91. Mr. Cassirer is seeking only to hold petitioners accountable for non-sovereign commercial conduct that a private person can and does perform, namely, their refusal to return to him the property that he owns, and which they display and exploit profitably in a museum. Moreover, the Ninth Circuit affirmed that the Foundation is "engaged in a commercial activity in the United States," Pet. App. 25a-30a, further evidence that the court's interpretation of Section 1605(a)(3) is consistent with the restrictive theory.

Contrary to petitioners' argument (Pet. 20-22), the FSIA's legislative history also supports the interpretation given to Section 1605(a)(3) by the court below.

The House Report states that "Section 1605(a)(3) would, in two categories of cases, deny immunity where 'rights in property taken in violation of international law are in issue.'" H.R. Rep. No. 94-1487 at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. The House Report notes that the jurisdictional nexus requirement in Section 1605(a)(3) defines the "two categories" to which the legislative history refers: (1) if the property at issue is in the United States in connection with the foreign state's commercial activity, or (2) if an agency or instrumentality of the foreign state owns the property and that agency or instrumentality is engaged in a commercial activity in the United States. *Id.*[7] The legislative history cites "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law" and "takings which are arbitrary or discriminatory in nature" as examples of conduct that "[t]he term 'taken in violation of international law'" encompasses, but in striking contrast to the history's discussion of the "two categories" of cases, here the legislative history omits any reference to the defendant foreign state,

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[7] Petitioners have no support for their statement that Section 1605(a)(3) "incorporates" the concepts of the Hickenlooper Amendment. Pet. 20. The Hickenlooper Amendment overrides application of the Act of State doctrine in expropriation cases; it does not address immunity. 22 U.S.C. § 2370(e)(2). The FSIA's legislative history specifically states that the FSIA is not intended to affect the Act of State doctrine. *See* 1976 U.S.C.C.A.N. at 6618; *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007).

further evidence that Congress did not intend to require the defendant foreign state to have taken the property. *Id.*

The plain meaning of Section 1605(a)(3) also makes eminent sense. It is a standard tenet of U.S. property law that good faith purchasers are not entitled to keep stolen property. *See, e.g.*, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633-34 (2000). There is no good reason why Congress would not have wanted to apply that doctrine here. While petitioners claim that the doctrine "would put an impossible burden on an innocent sovereign like Spain," Pet. 13, this is not so. If petitioners lose this case and return the Painting to Mr. Cassirer, they can seek reimbursement from the individual or entity from whom they purchased it, like any other recipient of stolen property.

E. Any Doubts Should Be Resolved In Favor of Denying Certiorari Because the Case Is In an Interlocutory Posture

Last but not least, the Court should deny the petition because this case is in an interlocutory posture. The parties still need to litigate substantive liability issues, as well as any other grounds for dismissal that petitioners may press. Waiting for these proceedings to play out will allow time to see whether any of the horrors petitioners predict do in fact arise, and, if additional cases are filed, waiting will allow

for further consideration of the issue by other lower courts. On the other hand, if petitioners win on remand, then this Court will have no need to address the questions presented here.

II. THERE IS NO NEED TO REVIEW THE COURT OF APPEALS' EXHAUSTION HOLDING

A. The Question Whether the FSIA Requires Exhaustion of "Available Remedies" Is Not Properly Presented

Petitioners ask this Court to decide whether a plaintiff relying on Section 1605(a)(3) of the FSIA must exhaust "available remedies in the relevant country" before bringing suit in the United States. Pet. i. This question is not presented here.

The Foundation "ma[de] no exhaustion argument" in the Ninth Circuit, and "d[id] not join Spain's." Pet. App. 30a n.20. For its part, Spain never disclosed to the Ninth Circuit "what remedies are available," *id.*, or even identified the country (Spain or Germany) in which Mr. Cassirer should supposedly seek such remedies. Spain's omission is reason enough to dispense with any exhaustion argument, for under standard exhaustion law, the defendant has the burden to demonstrate that there are available remedies in the foreign country. *See Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996) ("'The procedural practice of international human rights tribunals generally holds that the respondent has the

burden of raising the nonexhaustion of remedies as an affirmative defense and *must show that domestic remedies exist that the claimant did not use*.'" (quoting S. Rep. No. 249 at 9-10 (1991))) (emphasis added). Thus, whether Section 1605(a)(3) requires exhaustion when alternative remedies in "the relevant country" are "available," Pet. i, is a purely academic issue in this case – or at least at this point in the case's development.

B. The Court of Appeals' Holding That Section 1605(a)(3) Does Not Make Exhaustion "A Statutory Prerequisite To Jurisdiction" Is Narrow and Correct

The court of appeals held that Section 1605(a)(3) does not require a plaintiff to have attempted to exhaust remedies abroad as a jurisdictional prerequisite. Pet. App. 36a. In other words, the court of appeals declined to "read[ ] a mandatory exhaustion requirement into § 1605(a)(3)." *Id.* But the court of appeals declined to consider at this stage of the proceedings "whether prudential exhaustion may be invoked." Pet. App. 38a.

The court of appeals' narrow holding regarding mandatory exhaustion is correct, inasmuch as it accords with the absence of any exhaustion requirement in the text of Section 1605(a)(3). Numerous other statutes contain exhaustion requirements, demonstrating that Congress knows full well how to require exhaustion when it wishes to do so. *See, e.g.*, 28 U.S.C.

§ 1350 (note 2(b)) (Torture Victim Protection Act of 1991); 42 U.S.C. § 2000e-5 (Title VII). If petitioners wish Section 1605(a)(3) to require exhaustion, they should ask Congress to amend the statute rather than seek to have it rewritten by the judiciary.

None of the authority petitioners cites supports their claim that Mr. Cassirer must have attempted to exhaust remedies in a foreign state. Neither *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), nor the concurring opinion in *Patsy v. Board of Regents*, 457 U.S. 497, 518 (1982) (White, J., concurring), supports petitioners' exhaustion argument. Pet. 32 n.14. *Meyers* does not stand for any "general rule" that exhaustion is required before litigants sue in federal court; rather, *Meyers* simply rejected the argument that requiring a labor dispute to be considered, in the first instance, by the National Labor Relations Board violated the company's constitutional rights. In *Patsy*, Justice White recognized that "exhaustion is a statutory issue and the dispositive word on the matter belongs to Congress." 457 U.S. at 518. Where as here neither the plain language of the statute nor the legislative history suggest that Congress intended to require exhaustion, the Court should not do so either.

The two cases from the International Court of Justice – *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6 (Mar. 21); *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20) – simply discuss the norm that before a state will espouse a claim against another state on behalf of one

of its citizens, the citizen must have exhausted remedies in the foreign state. The State Department discusses this same norm in the statement from its website that petitioners cite. *See* Pet. 31 n.13. As noted above, *supra* at 13, espousal is a different situation than we have here.

The district court decisions in *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998) and *Greenpeace, Inc. (U.S.A.) v. France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996), and Justice Breyer's concurrence in *Altmann*, 541 U.S. at 714, likewise fail to suggest that Section 1605(a)(3) requires Mr. Cassirer to have exhausted remedies before bringing suit. These cases discuss exhaustion in the context of claims that a taking violated international law because the foreign state that expropriated the property failed to pay just compensation.[8] Mr. Cassirer, however, does not claim that Germany's looting of the Painting violated international law because Germany failed to pay just compensation. Rather he argues that the seizure of the painting violated international law because it was not done for a public purpose and was discriminatory

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[8] Furthermore, Justice Breyer also indicated by his citation to the Restatement that he was referring to the norm that a citizen must exhaust remedies before his or her country will espouse a claim against a foreign state. *See* Restatement § 713 cmt. f ("Under international law, ordinarily *a state is not required to consider a claim by another state* for an injury to its national until that person has exhausted domestic remedies.") (emphasis added).

and done in furtherance of the Nazi regime's genocide against Jews. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-12 (9th Cir. 1992) (a taking violates international law if the victim does not receive just compensation, if the taking is not for a public purpose, or if the taking was discriminatory).[9] Exhaustion thus is not relevant to any of the issues in this case even if the Court were inclined to rewrite the FSIA to add such a requirement.

C. The Holding Is Consistent With the Only Other Court of Appeals Decision to Discuss the Issue

Only one other federal court of appeals has discussed whether Section 1605(a)(3) requires the plaintiff to exhaust remedies, and that court likewise determined that no exhaustion is required. In *Agudas*, the D.C. Circuit affirmed the district court's decision not to obligate a plaintiff invoking Section 1605(a)(3) to exhaust remedies in Russia. 528 F.3d at 948-49. The D.C. Circuit pointed to the absence of an exhaustion requirement in the plain language of the FSIA, and noted that the inclusion of an exhaustion requirement in another (now repealed) section of the FSIA "strengthens the inference that its omission

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[9] The fact that Germany provided some compensation to victims of Nazi persecution after World War II, Pet. 29 n.1, thus does not change the fact that the original taking of the Painting, as part of Nazi genocide against Jews, was in violation of international law.

from a closely related section must have been intentional." *Id.* at 948.

D. Reviewing the Court of Appeals' Holding Before Prudential Exhaustion Is Litigated on Remand Would Be Premature

As noted above, the court of appeals "went no further" than the district court did here, holding only that the expropriation exception "does not *mandate* exhaustion," and "declin[ing] to consider at this stage of the proceedings whether prudential exhaustion may be invoked" in this case. Pet. App. 36a, 38a.

It would be premature for this Court to consider whether the FSIA mandates exhaustion before any prudential exhaustion proceedings play out on remand. Nothing in the petition for certiorari contends that there is any meaningful difference between mandatory and prudential exhaustion, nor is it immediately apparent what that difference might be. Consequently, if petitioners have a valid claim for exhaustion (they have not yet shown that any alternate remedy was available), they should be required to make it on remand. And if they somehow advance such a valid claim and the district court and court of appeals still refuse to require exhaustion, then petitioners can bring the case back to this Court, with a full record and a tangible argument as to why mandatory exhaustion matters here. Unless and until that happens, there is no reason to review any exhaustion argument.

III. THERE IS NO CONSTITUTIONAL ARGUMENT PROPERLY PRESENTED HERE

At various points, petitioners assert that the court of appeals' interpretation of Section 1605(a)(3) violates "the Constitution" or "due process." *See*, *e.g.*, Pet. 13, 17. The Court should ignore such assertions because no constitutional issue is properly presented here. Neither of the questions presented in the petition encompasses a constitutional claim, so the Court may not consider any such claim. *See* S. CT. R. 14.1(a). In addition, no constitutional argument was "pressed or passed upon" below. *Clark v. Arizona*, 548 U.S. 735, 764-65 (2006).[10]

Indeed, the fact that petitioners now seem to want to press constitutional arguments for dismissing this case reinforces the wisdom of allowing the case to play out on remand before considering whether to grant certiorari. Once petitioners have litigated all of the defenses they wish to raise in the district court, and if necessary in the court of appeals, a full record will exist. If, at that point, petitioners have been

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[10] In any event, there is no constitutional barrier to subjecting petitioners to this lawsuit. Even if petitioners were right that it somehow violates the Due Process Clause to abrogate a foreign country's sovereign immunity without any action on its part, the Ninth Circuit's interpretation of Section 1605(a)(3) does depend on actions that petitioners have taken. Petitioners have refused to return the Painting to Mr. Cassirer, and the Ninth Circuit affirmed that the Foundation "is engaged in a commercial activity in the United States" in satisfaction of the jurisdictional nexus requirement in Section 1605(a)(3).

found liable, they may seek certiorari in this Court and challenge that liability in a single proceeding on any basis they wish.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 10-786

In the
Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioners Kingdom of Spain ("Spain") and Thyssen-Bornemisza Collection Foundation ("Foundation") file this supplemental brief pursuant to Rule 15.8 of the Rules of this Court to respond to the brief filed by the Acting Solicitor General on May 27, 2011.

DISCUSSION

With limited citations and brief recitation of the analysis offered by the Ninth Circuit majority, the Acting Solicitor General makes a very bold assertion – this Court should not grant the petition because 28 U.S.C. 1605(a)(3) is a property restitution statute. *See* U.S. Br. 9. If the Court believes that Congress enacted Section 1605(a)(3) merely as a garden-variety property restitution statute – to be applied to eviscerate the presumptive immunity of a foreign sovereign in *any* situation where there is an allegation that property possessed by *that* sovereign was, at *some* time, involved in a violation of international law committed by *another* country, the Court should not grant the petition. The Acting Solicitor General offers little original analysis to support this dramatic departure. If, however, the Court believes that Section 1605(a)(3), like the other exceptions found in Section 1605(a), was intended to strip a sovereign of its immunity only where *it* has committed some *affirmative action* to permit (and warrant) being haled into a federal court to answer for its actions, the Court must grant the petition.

1. Citing *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007), the

Acting Solicitor General contends that Congress "intended" the Hickenlooper Amendment's exception to the act of state doctrine, 22 U.S.C. 2370(e)(2), to "operate independently from the expropriation to foreign sovereign immunity." U.S. Br. 14. The Acting Solicitor General overstates the importance of *Nemariam*. Neither Spain nor the Foundation disputes that the Hickenlooper Amendment and the FSIA's expropriation exception "operate independently." It is not disputed that the Hickenlooper Amendment curtails the act of state doctrine (a substantive defense) while Section 1605(a)(3) addresses a limitation on haling a foreign sovereign into federal court (jurisdiction). That these legal concepts "operate independently" does not mean that their scopes are not parallel. Both are intended to prevent the untenable policy of requiring sovereigns who have not committed violations of international law to answer for the actions of another sovereign in the courts of a third sovereign. Just as the Hickenlooper Amendment and the act of state doctrine do not apply to Spain or the Foundation – neither committed a violation of international law – the FSIA's expropriation exception was not intended to apply to Spain or the Foundation.

In addition, the Acting Solicitor General ignores persuasive authority that goes one step further. The Fifth Circuit in *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396 (5th Cir. 1985), properly observed that "Section 1605(a)(3) of the FSIA . . . *parallels* the so-called 'Hickenlooper Exception' to the act of state doctrine . . . . Like the Hickenlooper Exception, Section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated

property without compensation, or that is using expropriated property taken by another branch of the state." *See also FOGADE v. ENB Revocable Trust*, 263 F 3d 1274, 1294 (11th Cir. 2001) (citing *De Sanchez*) *De Sanchez* does not compare the "operation" of Section 1605(a)(3) and the Hickenlooper Amendment, rather, it recognizes that the *intention* and, more importantly, the *scope* of the legal contructs are parallel.

2. Spain and the Foundation contend that international law permits jurisdiction over a foreign state or instrumentality only for conduct that itself violates international law. *See* Pet. 27-28 The Acting Solicitor General asserts that the petitioners "cite no authority for that proposition." U S. Br. 12. The Acting Solicitor General ignores the letter it received from Spain and the Foundation which noted petitioners' inabihty to find *any* legislation or case law outside the United States that would subject a foreign sovereign nation to the jurisdiction of another foreign sovereign's court for the unrelated actions of a third-party sovereign.[1] Spain and the Foundation specifically referenced analogous legislation passed in other jurisdictions – the United Kingdom, Canada, and Australia – that adopts the restrictive theory of

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[1] Willing to go outside the record, the Acting Solicitor General references discussions with counsel for Respondent U S Br 16 The Acting Solicitor General fails, however, to acknowledge a letter sent on May 2, 2011, at the Deputy Solicitor General's invitation, by Spain and the Foundation which discussed the similarities between the Hickenlooper Amendment and the FSIA, as well as the absence of international law allowing courts of one nation to take jurisdiction over a foreign sovereign based on the alleged taking of a third sovereign.

immunity. *See* State Immunities Act of 1978 (United Kingdom), 17 I.L.M. 1123 (1978), State Immunity Act 1982 (Canada), 21 I.L.M. 798 (1982); Foreign States Immunity Act 1985 (Australia), 25 I.L.M. 715 (1985). Like the FSIA, sovereign immunity is *presumed*, subject to limited exceptions. *See id.* Like the FSIA, the above-mentioned laws provide an exception for a sovereign's acts that are "commercial" in nature. *Id.*

In invoking Section 1605(a)(3), Respondent is not, however, attacking a commercial act by Spain or the Foundation. Instead, he is asserting that United States courts have jurisdiction over Spain and the Foundation because of a violation of international law committed by *another* sovereign. The immunity laws of Canada, Australia, and the United Kingdom do not contain an exception that would strip immunity any time there has been a violation of international law, and they certainly do not contain an exception stripping the immunity of one foreign sovereign for the acts of another.

3. The Acting Solicitor General asserts that because the property at issue is "owned or operated" by the Foundation, Spain may "not ultimately be subject to the district court's jurisdiction" and that possibility "significantly diminishes the potential impact on foreign relations of the decisions below." U.S. Br. 16. The Acting Solicitor General ignores Section 1603(a)'s definition of "foreign state" which expressly includes "an agency of instrumentality of a foreign state . . . ." 28 U.S.C. 1603(a). Thus, any dismissal of the Kingdom of Spain should include the Foundation.

4. The Acting Solicitor General asserts the "issues presented in this case" – issues of sovereign immunity

– do not warrant review from this Court. U.S. Br. 22. Citing to numerous FSIA-invoking actions, including *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 466 F. Supp. 2d 6 (D.D.C. 2006), aff'd in part, rev'd in part and vacated in part, 528 F.3d 934 (D.C. Cir. 2008); *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007), cert. denied, 540 U.S. 877 (2003); and *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006), cert. denied, 547 U.S. 1193 (2006), the Acting Solicitor General contends that this Court need not examine the propriety of stripping a foreign sovereign of its presumptive immunity where it is not alleged to have committed the violation of international law that warrants jurisdiction because such a scenario "do[es] not seem to arise frequently." U.S. Br. 22.

What the Acting Solicitor General fails to acknowledge is that the Ninth Circuit's expansive reading of Section 1605(a)(3) to include *any* sovereign who possesses (or possessed) property that is alleged to have been taken in violation of international law at *some time*, by *another* sovereign creates the opportunity for many other sovereigns to be haled into federal courts. That Spain and the Foundation may have numerous substantive defenses to Respondent's claims (e.g. statute of limitations, act of state doctrine) is cold comfort because the act of stripping a sovereign of its immunity is a punishment akin to sanctions. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2191 (2009) ("Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of

munitions.").[2] The Ninth Circuit's interpretation of Section 1605(a)(3) could increase dramatically the number of FSIA cases brought in U.S. courts.

5. If an immunity exception can to be read as a simple property restitution statute, rather than as one of a few enumerated exceptions designed to limit immunity where a sovereign has acted in a way that warrants jurisdiction of U S. courts, the statute itself must state this clearly. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U S. 81, 93 (2007); *Af-Cap, Inc v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087-88 (9th Cir. 2007) ("In interpreting the FSIA, we first look to the plain meaning of the language employed by

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[2] Left undisturbed, the Ninth Circuit's decision will affect the willingness of foreign nations, including Spain, to engage in cultural, consular, and political activities in the United States for fear of being haled into court to answer for the actions of another sovereign For example, on June 26, 2009, the Russian Federation informed the district court that it "declined] to participate further in this litigation" and "believe(d) this Court has no authority to enter Orders with respect to the property owned by the Russian Federation and in its possession, and the Russian Federation will not consider any such Orders to be binding on it" *Agudas Chasidei Chabad of United States v Russian Fed'n*, 729 F Supp. 2d 141, 144 (D.D C 2010). On July 30, 2010, the district court entered a default judgment against the Russian Federation, ordering it to turn over historical and religious materials long-possessed by Russian archives and libraries *See id. at 148.* In direct response, State-run Russian museums, including the Hermitage in St. Petersburg and the Pushkin Museum of Fine Arts in Moscow, cancelled long-scheduled loans to American institutions *See* Carol Vogel and Clifford J Levy, *Dispute Derails Art Loans From Russia*, N Y Times, Feb 2 2011, at C1. It is evident from the *Chabad* case that other countries see an action against an agency or instrumentality as an attack on the sovereign itself

Congress" (internal quotation marks and citation omitted)). A plain reading of this statute does not support the Acting Solicitor General's broad interpretation. Thus, it falls to this Court to decide whether the Ninth Circuit's interpretation can, and should, stand.

6. The Acting Solicitor General does not dispute that "Congress intended the FSIA to be consistent with international law." *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992). As noted in the petition, "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law." Pet. 29 (quoting *Interhandel Case* (Switz. v. U.S.), 1959 I.C.J. 6, 27); *see also id.* ("Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."); *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), Judgment, 1989 I.C.J. 15; Restatement (Third) of Foreign Relations law of the United States § 713 cmt. f, § 703 cmt. d. and rep. n.5 (the latter noting that exhaustion of remedies is a precondition for a complaint under numerous international human rights conventions); Second report on Diplomatic Protection, United Nations International Law Commission, U.N. Doc. A/CN. 4/514 (Feb. 28, 2001). Nonetheless, the Acting Solicitor General contends that when Congress drafted the FSIA to comport with international law, it did not intend to require the internationally-recognized principle that a claimant must first exhaust

available remedies where the violation was alleged to have occurred.[3] U.S. Br. 17.

This Court has long acknowledged the general rule that parties must exhaust available remedies before seeking relief from the federal courts. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, & n.9 (1938). "[E]xhaustion is 'a rule of judicial administration,' * * * and unless Congress directs otherwise, rightfully subject to crafting by judges."

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[3] The Acting Solicitor General suggests that Congress was mindful of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) when it drafted the FSIA in 1976. U.S. Brief 17. In that case, Cuba, a communist nation, was alleged to have taken property of an American entity in violation of international law. *See Sabbatino*, 376 U.S. at 404-05. This Court noted that in attempting to resolve such an issue, it is proper for the claimant to first exhaust local remedies. *See id.* at 422-23 (recognizing that the "usual method for an individual to seek relief is to exhaust local remedies"). This Court, however found that exhaustion was not appropriate or necessary because Cuba's compensation program was likely "illusory," *id.* at 402, and Cuba's law was "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West," *id.* at 402-03. *See also id.* at 403 (describing Cuban law as "discriminatory, arbitrary and confiscatory").

Respondent has not asserted that exhaustion, a requirement under basic principles of international law, is impossible or unnecessary because a German compensation program would be illusory or because German law is "discriminatory, arbitrary or confiscatory" in nature. (Spain and the Foundation noted in the petition that following World War II, Germany implemented an extensive process to compensate the victims of Nazi persecution, addressing more than four million claims and paying more than DM 72 billion for claims settled. Pet. 29 n.12.) Thus, the concerns expressed in *Sabbatino* are not present here and do not counsel against requiring exhaustion.

Patsy v. Bd. of Regents of Florida, 457 U.S. 496, 518 (1982) (quoting *Myers*, 303 U.S. at 50). Because Congress did not state specifically that exhaustion is *not* required, this Court can, and should, recognize that exhaustion is appropriate and necessary under basic principles of international (and national) law.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply brief, the petition for a writ of certiorari should be granted.

Date: June 6, 2011

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FEB 22 2011

In the
Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

This case provides a suitable vehicle for resolution by this Court of two important questions of international significance and recurring practical importance regarding the Foreign Sovereign Immunities Act's ("FSIA"), 28 U.S.C. 1602 *et seq.* expropriation exception: (1) whether the FSIA's "expropriation exception" permits a United States court to strip a foreign sovereign of its presumptive sovereign immunity simply because it owns property allegedly taken in violation of international law by a different sovereign, and (2) whether a plaintiff relying on the FSIA's expropriation exception must exhaust available remedies in the relevant country before invoking a United States court's jurisdiction. Pet. i.

As respondent itself does not – indeed, cannot – dispute:

- There are few questions as important as whether an action implicates or interferes with foreign relations;

- The *en banc* Ninth Circuit's resolution of the questions presented directly conflicts with the publicly stated policy of the State Department – the drafter of the FSIA – regarding expropriation claims;

- The *en banc* Ninth Circuit's interpretation is directly at odds with the stated positions of at least two other courts of appeals and two district courts;

- The petition's interlocutory nature is no barrier to this Court's review – particularly, in light of the weighty concerns implicated by stripping a foreign sovereign of its immunity – as evidenced by this Court's repeated willingness to grant review of interlocutory FSIA petitions; and

- In FSIA cases where this Court declines to grant review outright, it regularly solicits the views of the Solicitor General and State Department.

Nonetheless, respondent advances five unpersuasive reasons why this Court should deny review and does not so much as address whether this case is an appropriate candidate for solicitation of the federal government's views. First, respondent claims that the *en banc* Ninth Circuit's decision does not "conflict" with the decision of any other court. But as explained in the petition, the Ninth Circuit's decision is at least in significant tension with the decisions of other courts, which have stated that Section 1605(a)(3) was intended to apply to the foreign sovereign who *itself* took property in violation of the laws of nations and that such a taking has not occurred unless and until the claimant has exhausted appropriate local remedies.

Second, respondent at least superficially asserts that the Ninth Circuit's holding does not conflict with any stated policy of the State Department. Respondent acknowledges, however, that the Ninth Circuit's interpretation directly contravenes the State Department's espousal policy, which, while arising in a slightly different context, does embody the State Department's policy for expropriation claims and, by

all appropriate measures, also embodies its reading of the expropriation exception that it drafted.

Respondent next contends that the questions presented are of limited significance. Putting aside the extraordinary significance of any case in which a United States court strips a foreign sovereign of its immunity, as explained *infra*, Section 1605(a)(3) has been invoked in dozens of cases, and that number is likely to increase as state legislatures continue to enact legislation designed to resuscitate otherwise stale international property claims like respondent's.

Respondent asserts that the interlocutory nature of this case counsels in favor of denying review. This Court, however, grants review of interlocutory petitions and does so even more frequently when issues are raised implicating weighty immunity and foreign affairs concerns, like those presented here.

Finally, respondent advances several merits-based arguments as to why the Ninth Circuit's decision is correct.[1] Petitioners disagree with those merits-based

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[1] Respondent does not defend the Ninth Circuit's holding that Section 1605(a)(3) "does not mandate that the plaintiff exhaust local remedies for jurisdiction to lie." Pet App. 5a. Respondent mistakenly asserts that the two judges who dissented from the *en banc* majority's decision "did not disagree with the majority's exhaustion analysis." BIO 9. This is patently incorrect. Judge Gould and Chief Judge Kozinski stated that Section 1605(a)(3) requires an exhaustion of remedies, "as part and parcel of determining whether there had been a taking in violation of international law." Pet. App. 43a.

Judge Gould and Chief Judge Kozinski so stated, of course, because contrary to respondents' mistaken assertion, BIO 25,

arguments for the reasons set forth in the petition and to be developed further if this Court grants review. But for present purposes, the significance of these arguments and their responses is that they underscore the fundamental tension – if not outright disagreement – between the views of the Ninth Circuit on one hand and the views of other courts and the State Department on the other, and suggest at a minimum the need for solicitation of the federal government's views – if not an outright grant of immediate review.

I. The Issues Presented In This Petition Are Of Exceptional Importance

Respondent devotes much of its brief in opposition to the assertion that this case presents a "relatively unusual situation," BIO 10, and that a court's need to interpret Section 1605(a)(3) arises "extremely infrequently," BIO 9. Such a suggestion is wholly misinformed. More than forty cases have addressed the FSIA's expropriation exception.[2] *See* Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. Transnat'l L. & Pol'y 1, 36 (2008) (collecting cases). Moreover, the universe of persons or families who may assert jurisdiction against a foreign sovereign under the FSIA and allege wrongful ownership is significant. In fact, in a brief

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petitioners did properly raise the exhaustion issue below. Both the district court and the Ninth Circuit majority addressed the issue.

[2] In fact, in its brief in opposition, respondent cites three FSIA cases filed within the last ten years that considered many of the very same FSIA challenges at issue in this action. BIO 10-11.

filed in *Von Saher v. Norton Simon Museum of Art at Pasadena* (No. 09-1254), currently before this Court on writ of certiorari, the Commission for Art Recovery notes that the "United States is home to the third-largest Holocaust survivor population in the world," and that, depending on this Court's resolution of the question presented in that case, "thousands of individuals" may be poised to bring claims to recover Nazi-looted artworks. Brief of *Amicus Curiae* Commission for Art Recovery in Support of Petitioner (No. 09-1254), at 8, 9. There can be little doubt that the majority of these claims would be made against foreign sovereigns, and it is very likely that a significant number could be directed at sovereigns and their agencies or instrumentalities who, like petitioners, are not alleged to have committed any violation of international law.

Moreover, this Court has consistently recognized that a case's impact on the United States' foreign relations is of fundamental importance, constituting ground for review.[3] *See, e.g., Christopher v. Harbury*, 536 U.S. 403, 412 (2002) (granting review because of the "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (recognizing that review was proper where the action "implicate[d] serious issues of foreign relations"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (granting review when issues "bear importantly on the conduct of the country's foreign relations"); *Kolovrat v. Oregon*,

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[3] The Ninth Circuit recognized the issues in this action to be so important that it decided to rehear the case *sua sponte*.

366 U.S. 187, 191 (1961) (finding review proper where case involved "important rights asserted in reliance upon federal treaty obligations"). Because the resolution of the questions presented will have a direct impact on foreign relations with Spain – and any other foreign sovereign who will be haled into court to respond to a violation of international law committed by a different sovereign – this petition is of sufficient importance to warrant review.

II. The Ninth Circuit's Interpretation Of Section 1605(a)(3) Is Directly At Odds With The State Department's Policy

Respondent asserts that "[t]he State Department – and in particular its Special Envoy for Holocaust Issues – has been aware of this case since its inception . . . ." BIO 12. Respondent's implication is, of course, that the State Department has not intervened in this action because it endorses the *en banc* majority's decision. The State Department's silence, however, cannot be read as tacit approval for the majority's holdings.[4]

In the only forum in which the State Department has stated its views regarding the process and propriety of asserting claims against foreign sovereigns for property restitution, the State Department has spoken clearly that it will not support such claims unless "the acts giving rise to the claim . . . constitute a violation of international law that is

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[4] Both the majority and the dissent below noted that the State Department's views are conspicuously absent from this case. Pet. App. 24a, 46a-47a.

attributable to the foreign government," and "the claimant . . . exhaust[s] local remedies in the relevant country, or demonstrate[s] that doing so would be futile."[5] The State Department's clear message regarding the conditions required for it to press a claim to a foreign sovereign is the only public, affirmative statement that appears to exist regarding the State Department's reading of the FSIA – an Act *drafted* by the State Department.[6] Because the State Department, the entity charged with developing

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[5] This website is available at http://www.state.gov/p/eur/rt/hlcst/c11383.htm.

[6] No one can dispute that the State Department is interested in this case. In early December 2010, WikiLeaks released the text of a July 2, 2008, cable summarizing a meeting between the U.S. Ambassador in Madrid and the Spanish Minister of Culture. *See US embassy cables: US and Spain discuss Nazi stolen art and treasure seeking company Odyssey*, Guardian.co.uk [The Guardian (London)], Dec. 8, 2010, available at: http://www.guardian.co.uk/world/us-embassy-cables-documents/160421. In the cable, the Ambassador offered to support Spain in the "Odyssey matter" (a dispute between Spain and an underwater exploration company regarding the ownership of sunken Spanish treasure) if Spain would provide assistance in the Cassirer action. In the view of the U.S. diplomat, it was "in both governments' interest to avail themselves of whatever margin for maneuver they had, consistent with their legal obligations, to resolve both matters in a way that favored the bilateral relationship." *Id.* The Spanish contingency refused to barter, however, and maintained that the issues were separate. *Id.*

Because the State Department has been aware of this action from its inception and, rather than allow the action to play out in the courts, has pressed Spain to enter into a diplomatic agreement, one could reasonably conclude that the State Department is not willing to adopt the FSIA interpretation advanced by the *en banc* majority.

applicable foreign policies, has recognized that restitution may be sought only against the sovereign that is alleged to have violated international law and that exhaustion is necessary, the courts should defer to its interpretation. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (recognizing that "this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities").

As noted in the petition, this Court routinely solicits the views of the Solicitor General who, together with the State Department, has filed amicus briefs in connection with a significant number of petitions involving the FSIA. Pet. 8-9, n.2 (listing twelve recent briefs filed by the Solicitor General in actions involving the FSIA).[7] Because the proper and uniform application of the FSIA is of great importance, and because both parties and the Ninth Circuit have questioned the State Department's position, if the Court is unwilling to grant the petition outright, the Court should at a minimum request the views of the Solicitor General.[8]

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[7] Before granting review, this Court sought the views of the Solicitor General in *Von Saher*, mentioned above, a case posing procedural challenges to Holocaust-era claims.

[8] Recognizing the importance and frequency of World War II restitution claims, the State Department created a distinct department, the Office of the Special Envoy for Holocaust Issues, to "develop[] and implement[] U.S. policy with respect to the return of Holocaust-era assets to their rightful owners." Holocaust Issues webpage, U.S. Department of State, at:

III. The Ninth Circuit's Interpretation Of Section 1605(a)(3) Is In Tension With The Interpretation Of Other Circuits

Respondent asserts that the Ninth Circuit's decision does not conflict with decisions from other circuits. BIO 11. It is beyond dispute, however, that the Ninth Circuit's holding is in dramatic tension with two other circuits that have reviewed Section 1605(a)(3) and recognized that this immunity-stripping exception should apply to nations that themselves have taken the property in violation of international law.

Although not squarely presented with the question of whether to strip the sovereignty of a foreign nation where that nation did not commit a violation of international law, the Fifth Circuit, in analyzing the parameters of Section 1605(a)(3) recognized that "the legislative history of the FSIA indicates that Section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of that state." *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 204 (5th Cir. 1984). Similarly, in *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008), the D.C. Circuit acknowledged that Section

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http://www.state.gov/p/eur/rt/hlcst/. The State Department's expropriation policy, described above, noting the limited situations where the U.S. will espouse a claim to a foreign government, falls under the banner of the Office of the Special Envoy for Holocaust Issues.

1605(a)(3), "effectively require[es] that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law." *Id.* at 941. Full-fledged conflict or not, these interpretations are clearly at odds with the Ninth Circuit's holding that a sovereign can be stripped of its presumptive immunity because of the wrongful acts of another, unrelated sovereign.

IV. The Nature Of this Case Warrants Immediate Review

Where, as here, a case involves an issue of great importance, a petition's interlocutory nature is no barrier to this Court's review. *See* Robert L. Stern et al., Supreme Court Practice § 4.18, at 282 (9th ed. 2007) (noting that "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review"); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893) (recognizing that this Court has not hesitated to review an interlocutory judgment of a court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"); *see also, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

Respondent's assertion that review is premature might be persuasive in a small-dollar action between two private parties, but those concerns get no traction when the case involves a foreign sovereign. The Kingdom of Spain – a sovereign nation which is a long-time ally of the United States, a NATO member, a

member of the European Union, and the Ninth largest economy in the World, having mutual trade with the United States of more than $18 billion in 2010 – is a petitioner. If the Ninth Circuit's *en banc* decision stands, Spain will be forced to submit to the jurisdiction of the courts of the United States and defend itself against a private property claim, in an action involving an object that has no connection to the United States and where it is beyond dispute that Spain has committed no violation of international law. *See Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (recognizing that "[a] foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity").

Before forcing a sovereign nation to submit to the jurisdiction of U.S. courts, this Court must determine whether such an action is contemplated, permitted, and endorsed by the FSIA.[9] *See Compania Mexicana*

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[9] Issues discussed in this petition also raise important diplomatic and international concerns. Even within the last year, a legal challenge to the FSIA's expropriation exception erupted in the United States, having far-reaching consequences. On June 8, 2008, the U.S. Court of Appeals for the D.C. Circuit held that the FSIA's expropriation exception did not apply to bar the plaintiffs' claims and found that the district court could exercise jurisdiction over the Russian Federation. *See Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 955 (D.C. Cir. 2008). On June 26, 2009, the Russian Federation informed the district court that it "decline[d] to participate further in this litigation" and "believe[d] this Court has no authority to enter Orders with respect to the property owned by the Russian Federation and in its possession, and the Russian Federation will not consider any such Orders to

de Aviacion, S.A. v. United States Dist. Ct., 859 F.2d 1354, 1358 (9th Cir. 1988) (recognizing that the history of the FSIA, "including representations of the State Department," supported a "prompt" determination of sovereign immunity).

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be binding on it." *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 729 F. Supp. 2d 141, 144 (D.D.C. 2010). On July 30, 2010, the district court entered a default judgment against the Russian Federation, ordering it to turn over historical and religious materials long-possessed by Russian archives and libraries. *See id.* at 148. In direct response, State-run Russian museums, including the Hermitage in St. Petersburg and the Pushkin Museum of Fine Arts in Moscow, cancelled long-scheduled loans to American institutions. If the Ninth Circuit's opinion stands unquestioned, Spain and other foreign sovereigns may feel compelled to reconsider and withdraw from their agreements (cultural and otherwise) with the United States.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, certiorari should be granted.

Date: February 22, 2010

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No. 10-786

In the Supreme Court of the United States

KINGDOM OF SPAIN, ET AL., PETITIONERS

v.

ESTATE OF CLAUDE CASSIRER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a district court may exercise subject-matter jurisdiction under 28 U.S.C. 1605(a)(3) over the Kingdom of Spain and its instrumentality, the Thyssen-Bornemisza Collection Foundation (Foundation), based on allegations that the Foundation has possession of a painting that was previously taken by the Nazi government in violation of international law.

2. Whether respondent must exhaust available remedies in Spain or Germany before being permitted to sue under 28 U.S.C. 1605(a)(3).

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In the Supreme Court of the United States

No. 10-786

KINGDOM OF SPAIN, ET AL., PETITIONERS

v.

ESTATE OF CLAUDE CASSIRER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondent Claude Cassirer brought this action against the Kingdom of Spain and one of its instrumentalities, the Thyssen-Bornemisza Collection Foundation (petitioners in this Court). Respondent sought to recover a painting that allegedly had been confiscated from his Jewish grandmother by the Nazi government.[1]

[1] The original plaintiff, Claude Cassirer, died while this litigation was pending, and Cassirer's estate was substituted as the plaintiff. For purposes of this brief, the government refers to Cassirer rather than his estate as the respondent.

Respondent's grandmother, Lilly Cassirer Neuberger, owned a painting by Camille Pissarro entitled *Rue Saint-Honoré, Apres-Midi, Effet de Pluie*. After years of intensifying persecution of German Jews by the Nazis, Neuberger decided in 1939 that she had no choice but to leave Germany. Neuberger was required, however, to obtain permission from the Nazi government both to leave the country and to take any belongings with her. Pet. App. 3a, 5a-6a.

An art dealer appointed by the Nazi government, Jakob Scheidwimmer, refused permission for Neuberger to take the Pissarro painting out of Germany. He demanded that she surrender it in exchange for a payment of approximately $360, to be paid into a blocked bank account. Scheidwimmer subsequently traded the painting to another dealer, from whom it was confiscated by the Gestapo and sold at auction in 1943. After a series of intervening sales, the painting was purchased by Baron Hans-Heinrich Thyssen-Bornemisza, a prominent Swiss private collector. In 1993, Bornemisza sold his entire art collection, including the Pissarro painting, to the Foundation. The Spanish government gave $327 million to the Foundation to purchase the Bornemisza collection, and provided the Foundation with the Villahermosa Palace in Madrid for use as a museum. Pet. App. 6a-7a.

In 2000, respondent discovered that the Pissarro painting was on display at the Thyssen-Bornemisza Museum in Madrid. He requested return of the painting from Spain's Minister of Education, Culture and Sports, who was the Chair of the Board of the Foundation, but that request was refused. Respondent did not try to obtain the painting through judicial proceedings in Spain, nor did he pursue any other remedies in either Spain or

Germany before bringing the present action. Pet. App. 7a.

2. In 2005, respondent filed suit against the Kingdom of Spain (Spain) and the Foundation in the District Court for the Central District of California. For purposes of subject-matter jurisdiction over Spain and the Foundation, respondent relied on the "expropriation" exception in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(3). Although a foreign state is generally immune from suit in federal or state court under Section 1604 of the FSIA, Section 1605 establishes a number of exceptions to that general rule.[1] Specifically, the expropriation exception at issue here provides for subject-matter jurisdiction in any case

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. 1605(a)(3).

Respondent did not allege that petitioners had themselves taken the painting in violation of international law, but simply that they had purchased the painting decades after its unlawful seizure by the Nazi government. Respondent nonetheless argued that the expro-

[1] The FSIA defines a "foreign state" to include any agency or instrumentality thereof that meets certain conditions. See 28 U.S.C. 1603(a) and (b).

priation exception was applicable because the Pissarro painting had been confiscated from Neuberger by the Nazi government in violation of international law. Respondent thus maintained that this case is one "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). In order to satisfy the remainder of Section 1605(a)(3), respondent did not allege that the Pissarro painting was "present in the United States" in connection with any commercial activity carried on by petitioners. *Ibid.* Respondent did allege, however, that the painting was "owned or operated" by the Foundation, which was "an agency or instrumentality" of Spain that was "engaged in a commercial activity in the United States." *Ibid.*

Petitioners moved to dismiss the complaint on multiple grounds, including that the district court lacked subject-matter jurisdiction. The Foundation did not dispute that it owned the painting and was an agency or instrumentality of Spain, and neither petitioner disputed that the painting had been taken by the Nazis in violation of international law. See, *e.g.*, 2:05-cv-03459 Docket entry No. 13, at 1 (C.D. Cal. Feb. 28, 2006). Rather, petitioners challenged jurisdiction on three grounds. First, they argued that Section 1605(a)(3) permits jurisdiction only over a foreign state that itself has taken property in violation of international law. See *id.* at 4-6. Second, they argued that, even if a nonexpropriating state or its instrumentality could be subject to jurisdiction under Section 1605(a)(3), the Foundation was not "engaged in a commercial activity in the United States." See *id.* at 6-12. Third, they argued that respondent had failed to exhaust remedies in Spain or Germany. See 2:05-cv-03459 Docket entry No. 42, at 13-16 (C.D. Cal. June 9, 2006).

3. The district court rejected petitioners' argument that Section 1605(a)(3) applies only to expropriating states. See 2:05-cv-03459 Docket entry No. 37 (C.D. Cal. Apr. 27, 2006). In the court's view, the text of Section 1605(a)(3) "contains no indication that the sovereign in possession of the allegedly unlawfully expropriated property must be the entity that acted in violation of international law." *Id.* at 2. The court thus permitted discovery into whether petitioners had conducted sufficient commercial activities within the United States to permit jurisdiction under Section 1605(a)(3). *Id.* at 4.

After the parties had conducted that discovery, the district court denied the motions to dismiss. Pet. App. 100a-140a. As relevant here, the court rejected petitioners' remaining two arguments. First, it concluded that the Foundation was "engaged in a commercial activity in the United States" within the meaning of Section 1605(a)(3). *Id.* at 126a-133a. Second, the court held that "the plain language of Section 1605(a)(3) * * * contains no exhaustion-of-foreign-remedies requirement," and it concluded that "an exhaustion requirement should not be implied where Congress created no such obligation." *Id.* at 107a.

4. a. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 55a-99a. The court of appeals granted rehearing en banc, and the en banc court affirmed in relevant part. *Id.* at 1a-54a. The court first held that the district court had subject-matter jurisdiction over this action pursuant to Section 1605(a)(3). It reasoned that the statute's takings element, which is phrased in the passive voice, is satisfied whenever the case involves "rights in property taken in violation of international law." *Id.* at 17a (emphasis omitted) (quoting 28 U.S.C. 1605(a)(3)). The court con-

cluded that nothing in the FSIA's legislative history, other appellate decisions, or the Restatement (Third) of the Foreign Relations Law of the United States undermined its interpretation of Section 1605(a)(3). *Id.* at 18a-21a.

The en banc court further supported its conclusion by observing that "[Section] 1605(a)(3) restricts jurisdiction over an entity of a foreign state that owns property taken in violation of international law to those engaged in commercial activity in the United States." Pet. App. 21a-22a. The court reasoned that the exercise of jurisdiction in such circumstances is consistent with the purpose of the FSIA to subject foreign states or their instrumentalities to suit in United States courts for their commercial, but not for their sovereign, acts. *Id.* at 21a-23a. The court rejected petitioners' argument that Section 1605(a)(3) requires a nexus between petitioners' challenged conduct (*i.e.*, their ownership of the Pissarro painting) and their commercial activity in the United States. *Id.* at 27a-29a.

Finally, the en banc court held that Section 1605(a)(3) did not require respondent to exhaust remedies in Spain or Germany before bringing this suit. Pet. App. 30a-37a. The court observed that, on its face, Section 1605(a)(3) "contains no exhaustion requirement." *Id.* at 30a. The court reasoned that implying such an exhaustion requirement would be inconsistent with the FSIA's legislative history, which indicates that the Act "create[s] a comprehensive, and exclusive, set of legal standards governing claims of immunity in every civil action against a foreign state." *Id.* at 31a. The court declined to decide, however, whether on remand the district court could impose a prudential exhaustion requirement, because such a requirement would not affect

subject-matter jurisdiction under the FSIA. *Id.* at 36a-37a.

b. Judge Gould, joined by Chief Judge Kozinski, dissented. Pet. App. 38a-54a. In his view, Section 1605(a)(3) does not clearly apply to a foreign state that has not itself taken property in violation of international law, and various canons of construction counsel against such an interpretation. *Id.* at 40a-53a. Judge Gould indicated that, if he were to reach the question, he would interpret Section 1605(a)(3) to require exhaustion of foreign remedies. *Id.* at 43a n.3.

DISCUSSION

The court of appeals correctly held that the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3), permits a court to exercise jurisdiction over an instrumentality of a foreign state that owns property taken in violation of international law. The court also correctly held that Section 1605(a)(3) does not require that a plaintiff exhaust foreign remedies before bringing suit against the foreign instrumentality. Review of those holdings is not warranted. Neither is in conflict with any decision of this Court or of any other court of appeals. Indeed, petitioners identify only a handful of other cases involving these questions. Moreover, this case does not clearly present the mandatory exhaustion question, and in any event the court of appeals left open on remand the question of whether to require prudential exhaustion.

A. The FSIA's Expropriation Exception Permits The Exercise Of Subject-Matter Jurisdiction Over The Foundation

1. The court of appeals correctly concluded that the exception to foreign sovereign immunity in Section 1605(a)(3) applies in this case and permits the exercise

of subject-matter jurisdiction over the Foundation. The statute contains two jurisdictional prerequisites, and respondent's complaint satisfies both of them. *First*, Section 1605(a)(3) requires that a plaintiff's suit be one "in which rights in property taken in violation of international law are in issue." In his complaint, respondent alleges—and petitioners do not challenge before this Court—that the Foundation owns a Pissarro painting taken from respondent's grandmother by the Nazi government in violation of international law. See, *e.g.*, 2:05-cv-03459 Docket entry No. 1, at 8-9 (C.D. Cal. May 10, 2005). Respondent's "rights in property taken in violation of international law" are therefore very much "in issue" in this case.

Second, Section 1605(a)(3) requires either that the property be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or that the property be "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." Here, respondent does not allege that the Pissarro painting is "present in the United States" in connection with any commercial activity carried on by Spain. But respondent does allege—and petitioners again do not challenge before this Court—that the Foundation is an instrumentality of Spain engaged in commercial activity in the United States. Respondent's complaint therefore satisfies Section 1605(a)(3)'s express requirements with respect to the Foundation.

2. a. Petitioners argue that the expropriation exception is ambiguous because "[it] does not expressly say" whether the property at issue must have been taken "by the [defendant] foreign state" or "by *any* foreign state,"

Pet. 18, and they contend that this supposed ambiguity should be resolved by requiring that the defendant foreign state have been the wrongdoer. But the absence of any reference to the responsible foreign state indicates that Congress was interested in the fact of the unlawful expropriation, not the identity of the expropriator. Congress drafted the exception to govern all cases "in which rights in property taken in violation of international law are in issue" (if the requisite nexus to commercial activity is also present), without regard to whether the defendant foreign state took the property or subsequently came into possession of it. As the court of appeals explained, "[t]he text is written in the passive voice, which 'focuses on an event that occurs without respect to a specific actor.'" Pet. App. 17a (quoting *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009)). "Thus, the text already connotes '*any* foreign state,'" and the court interpreted the statute in accord with its most natural meaning. *Ibid.*

The FSIA's emphasis on the fact of a taking carries over to its provision governing attachment of a foreign state's property in the United States, 28 U.S.C. 1610 (2006 & Supp. III 2009). Section 1610(a)(3) parallels Section 1605(a)(3): it provides that certain property is not immune from attachment to execute "a judgment establishing rights in property which has been taken in violation of international law." But elsewhere in the FSIA's attachment provision, Congress concentrated on the identity of the expropriator. Section 1610(f)(1) permits the attachment of certain property owned by a foreign state found liable for terrorism, and refers to property "expropriated or seized *by* the foreign state." 28 U.S.C. 1610(f)(1)(B) (emphasis added). That is because the parallel jurisdictional exception permits suits

for monetary damages "against a foreign state" for terrorist acts committed by agents "of such foreign state." 28 U.S.C. 1605A(a)(1) (Supp. III 2009).[5] Where Congress has chosen to make an exception to foreign sovereign immunity turn not simply on the fact of expropriation but the identity of the expropriating state, it has said so in the FSIA. Congress has not so provided in Section 1605(a)(3).

b. Petitioners also assert that the expropriation exception was "intended to apply to foreign states that have committed a jurisdictionally-significant act." Pet. 22. That assertion begs the question of what act by a foreign state should be considered jurisdictionally significant. The text of the FSIA supplies the answer: If the case is one "in which rights in property taken in violation of international law are in issue," then the conduct that gives rise to jurisdiction is commercial activity in the United States by the foreign state or instrumentality: either (i) the expropriated property is "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or (ii) the property is "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. 1605(a)(3). Section 1605(a)(3)'s reliance on commercial activity in the United States by the foreign state or instrumentality as the jurisdictionally significant act is consistent with the general practice under the restrictive theory of immunity of abrogating such immunity based on commercial activities conducted by a foreign state in the forum

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[5] Section 1605A(a)(1) was formerly codified at 28 U.S.C. 1605(a)(7) (2006), and was separately codified in 2008.

state. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487, 488-489 (1983).

3. Petitioners ground their arguments in a number of policies and authorities outside the FSIA. None counsels in favor of a different interpretation of Section 1605(a)(3).

a. Petitioners argue (Pet. 10-11) that the decision below conflicts with the State Department's espousal policy. Espousal is the process by which the "government of the United States, usually through diplomatic channels, makes [a private citizen's claim] the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." *Abrahim-Youri* v. *United States*, 139 F.3d 1462, 1463 n.2 (Fed. Cir. 1997) (citation omitted). As petitioners note (Pet. 11), the State Department will consider espousing a claim of expropriation against a foreign government only if certain conditions are satisfied, including that (i) the claimed violation of international law is attributable to that foreign government, and (ii) the claimant has exhausted local remedies in the relevant country or demonstrated that exhaustion would be futile.

The State Department's espousal policy does not, and is not intended to, have any logical bearing on the proper interpretation of Section 1605(a)(3). The espousal policy governs when the United States will adopt the claim of one of its citizens for the purposes of state-to-state resolution; it does not govern whether the rights of U.S. citizens under international law have been violated in the first instance, let alone whether those citizens can satisfy the FSIA's expropriation exception and invoke the jurisdiction of federal courts. Indeed, one purpose of the FSIA was to enable private parties to

obtain—and, in some instances, to execute upon—judgments against foreign states or instrumentalities without the need for State Department espousal. Cf. 28 U.S.C. 1602; H.R. Rep. No. 1487, 94th Cong., 2d Sess., 8, 13, 27-29 (1976) (*1976 House Report*). There is no basis, then, for the State Department's diplomatic policy governing resolution of claims with foreign nations to limit the FSIA's exceptions to sovereign immunity for suits by private parties.

b. Petitioners contend (Pet. 27-28) that international law permits jurisdiction over a foreign state or instrumentality only for conduct that itself violates international law. Petitioners cite no authority for that proposition, and in any event the FSIA subjects foreign states to suit in a variety of circumstances that do not involve any violation of international law. See, *e.g.*, 28 U.S.C. 1605(a)(2) (exception to foreign sovereign immunity for suits based on a foreign state's commercial activity in the United States); 28 U.S.C. 1605(a)(4) (same; suits in which certain rights in property in the United States are at issue); 28 U.S.C. 1605(a)(5) (same; suits based on certain types of tortious conduct); see also Convention on Jurisdictional Immunities of States and Their Property Art. 10, U.N. Doc. A/59/508 (2004) (exception to foreign sovereign immunity for claims arising out of certain commercial transactions); *id.* Art. 11 (same; claims relating to certain employment contracts); *id.* Art. 13 (same; claims arising out of ownership, possession, or use of certain property in the forum state).

c. Petitioners point (Pet. 16 n.9) to the Restatement (Third) of Foreign Relations Law of the United States (1987) (Restatement). Section 455 of the Restatement addresses the immunity of foreign states from jurisdiction, and it appears to contemplate that immunity is

withdrawn only for an expropriating state. See 1 Restatement § 455(3)(a) and (b) at 411; *id.* § 455 cmt. c at 412 (stating that jurisdiction is appropriate in part if "the property was taken by the foreign state in violation of international law"). But the Restatement was drafted in 1987, eleven years *after* the FSIA was enacted. And although the Restatement says that it "reflect[s] Section 1605(a)(3)" of the FSIA, *ibid.*, it adds a requirement—that the property at issue was "taken by the foreign state"—that is not present in Section 1605(a)(3), without indicating whether that choice of wording was meaningful, imprecise, or inadvertent. Even assuming that the drafters of the Restatement intended to address, *sub silentio*, jurisdiction over a nonexpropriating state, petitioners cite no authority for the proposition that the text of the Restatement (and its commentary) should control over the quite different and broad text of the FSIA itself.

d. Finally, petitioners rely (Pet. 20) on the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). That provision was enacted following this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), which held that the act of state doctrine barred litigation of the ownership of property that had been expropriated by the Cuban government. *Id.* at 436-437. The Hickenlooper Amendment overturns that result. It provides that United States courts shall not "decline on the ground of the federal act of state doctrine to make a determination on the merits" in a case "in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking * * * by an act of that state in violation of the principles of international law."

22 U.S.C. 2370(e)(2). Petitioners contend (Pet. 20-21) that the Hickenlooper Amendment abrogates the act of state doctrine only for expropriating states, and the FSIA's waiver of foreign sovereign immunity should be interpreted in parallel fashion.

As an initial matter, it is not established that the Hickenlooper Amendment denies an act of state defense to a foreign state only if that state confiscated the property at issue, and petitioners cite no authority for that proposition. Senator Hickenlooper, when explaining the amendment, specifically noted that it would "discourage purchases of expropriated property since the purchasers would be unable to rely automatically on the act of state doctrine and would have to establish their lack of notice of the violation of international law that took place in the seizure." 110 Cong. Rec. 19,557 (1964). Nothing in this statement suggests that it did not apply equally to a foreign state that purchased property that had been expropriated by another foreign state.

In any event, Congress "intended that the expropriation exception to foreign sovereign immunity operate independently from the Hickenlooper Amendment's exception to the act of state doctrine." *Nemariam* v. *Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007); see *1976 House Report* 20 (explaining that the FSIA's expropriation exception "deals solely with issues of immunity" and "in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable"). Although the FSIA authorizes United States courts to exercise subject-matter jurisdiction over a foreign state or instrumentality that possesses property that was unlawfully expropriated, the FSIA does not itself affect the substantive liability of those foreign entities. Thus, whether the plaintiff has

a valid cause of action or whether the foreign state has a valid defense, including one based on the act of state doctrine, does not affect the jurisdiction of United States courts to adjudicate those questions.

4. Petitioners apparently assumed below that (and the court of appeals therefore did not address whether) if Section 1605(a)(3) permits jurisdiction over the Foundation, it also permits jurisdiction over the Kingdom of Spain. That assumption is erroneous. If an action is one "in which rights in property taken in violation of international law are in issue," then Section 1605(a)(3) requires either of two types of commercial activity in the United States: (i) the expropriated property must be "present in the United States in connection with a commercial activity carried on in the United States *by the foreign state*," or (ii) the property must be "owned or operated *by an agency or instrumentality of the foreign state* and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. 1605(a)(3) (emphasis added).

Whether jurisdiction exists over the foreign state depends on which prong of Section 1605(a)(3) the plaintiff invokes. Where a plaintiff alleges that the property at issue "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(3), then there is jurisdiction over the foreign state itself based on its own commercial activities within this country. But where a plaintiff alleges that the property is "owned or operated by an agency or instrumentality of the foreign state * * * engaged in a commercial activity in the United States," then there is jurisdiction over only the foreign agency or instrumentality that has availed itself of American markets, not the foreign state. *Ibid.*; cf.

Garb v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006).

Counsel for respondent has informed this Office that on remand before the district court respondent would not oppose a motion to dismiss the Kingdom of Spain from this case. Because the Foundation would still be subject to jurisdiction before the district court, and because the Foundation and Spain have a shared interest in opposing the relief that respondent seeks, it is conceivable that Spain would choose not to seek to be dismissed as a party. But the fact that Spain may not ultimately be subject to the district court's jurisdiction—and in any event that other foreign states should not be subject to the jurisdiction of United States courts based on the possession of expropriated property by their agencies and instrumentalities—significantly diminishes the potential impact on foreign relations of the decision below.

B. The FSIA's Expropriation Exception Does Not Require Respondent To Exhaust Remedies In Spain Or Germany

1. The court of appeals correctly held that Section 1605(a)(3) does not mandate that a plaintiff exhaust foreign remedies before bringing suit against a foreign state or instrumentality. Section 1605(a)(3) itself says nothing about exhaustion. That is in contrast to the former Section 1605(a)(7), which required that a plaintiff suing a foreign state for state-sponsored terrorism "afford[] the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." 28 U.S.C. 1605(a)(7)(B)(i) (2006). Congress knows how to require plaintiffs to seek other remedies before bringing suit under Section 1605(a), and it has not done so in Section 1605(a)(3).

In addition, the FSIA's expropriation exception was enacted following this Court's decision in *Sabbatino*, which declined to adjudicate claims to property expropriated by the Cuban government. See p. 13, *supra*. The FSIA's expropriation exception provides for subject-matter jurisdiction over certain such suits—*i.e.*, it prevents a foreign entity from invoking sovereign immunity when a plaintiff alleges a taking in violation of international law and demonstrates that the foreign entity carries on the requisite commercial activity in the United States. In *Sabbatino* itself, the Court noted that Cuba had "formally provided" a system of compensation for expropriated property, although "the possibility of payment under it may well be deemed illusory." 376 U.S. at 402; see *id.* at 402 n.4. It is unlikely that Congress intended to require the victims of expropriation abroad to exhaust foreign remedies, whether real or illusory, and yet said nothing about it in Section 1605(a)(3).

2. Petitioners invoke (Pet. 29-32) international law, but there is no requirement in international law that a plaintiff must exhaust local remedies for a viable expropriation claim to arise. To be sure, if a taking of property by a foreign state is for a public purpose and is not discriminatory, then the taking violates international law only if it is not accompanied by prompt, adequate, and effective compensation. 2 Restatement § 712(1)(c) & cmt. c at 196, 198. Accordingly, for those types of takings, a plaintiff may need to have pursued and been denied compensation in the foreign state for there to be a ripe taking claim at all. Cf. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985). But where, as here, the taking violated international law because it was not for a public purpose

or was discriminatory, the taking claim does not depend upon a showing that the plaintiff has sought and been denied just compensation. In any event, these considerations go to whether a taking in violation of international law has occurred, and here petitioners concede that such a taking occurred. Accordingly, to the extent that these considerations bear at all on this case, they can be taken into account on remand in determining whether exhaustion should be required as a prudential matter. See p. 21, *infra*.

C. Review By This Court Is Not Warranted

The court of appeals' decision does not warrant review at this time. With respect to both questions presented, the decision below is not in conflict with any decision of this Court or of any other court of appeals. Indeed, petitioners identify only a few other cases involving either question. Moreover, this case does not clearly present the issue of mandatory exhaustion, and the court of appeals left open on remand whether to require prudential exhaustion.

1. Petitioners incorrectly assert that the court of appeals' immunity ruling is in "significant tension" with decisions of the Fifth and District of Columbia Circuits. Pet. 6; see Pet. 15-17 ("Two other circuits have reviewed Section 1605(a)(3) and recognized that this immunity-stripping exception applies to nations that themselves have expropriated property in violation of international law."). Neither of those decisions addresses whether a nonexpropriating foreign state or instrumentality may be subject to suit under Section 1605(a)(3).

In *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984) (per curiam) (*Vencedora*), a

shipowner brought suit against the Republic of Algeria and one of its instrumentalities for expropriating a vessel off the Algerian coast. *Id.* at 196. Because the defendants were alleged to have taken the vessel, the Fifth Circuit had no occasion to address whether Section 1605(a)(3) also reaches a nonexpropriating foreign state or instrumentality. Indeed, without deciding whether the vessel had been "taken in violation of international law," *id.* at 204, the Fifth Circuit held that jurisdiction did not lie under Section 1605(a)(3) because the vessel was not "owned or operated" by the Algerian defendants, *ibid.* That issue is not at dispute here: the parties agree that the Foundation owns the Pissarro painting.[4]

By contrast, in *Agudas Chasidei Chabad of United States* v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) (*Chabad*), a Jewish organization brought suit against the Russian government to recover two sets of religious materials; the first set had been seized by the Russian government in 1917 and the second set by Nazi forces in 1939. *Id.* at 938. On appeal, Russia did not challenge the district court's ruling that "[f]or the purposes of the FSIA, the defendant-state need not be the

[4] In the course of holding that the Algerian defendants did not own or operate the expropriated vessel, the Fifth Circuit stated that "[S]ection 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of the state." *Vencedora*, 730 F.2d at 204. It is certainly true, as the Fifth Circuit recognized, that Section 1605(a)(3) applies to an expropriating foreign state. But the question here is whether Section 1605(a)(3) also applies to a nonexpropriating foreign state. That question was not at issue in *Vencedora*, and the Fifth Circuit's statement did not purport to delineate the outer bound of the expropriation exception.

state that took the property in violation of international law." *Chabad*, 466 F. Supp. 2d 6, 19 (D.D.C. 2006). Russia did contend that property had not been taken in violation of international law, and the District of Columbia Circuit therefore framed the issue as whether "the defendant (or its predecessor) has taken the plaintiff's rights in property * * * in violation of international law." *Chabad*, 528 F.3d at 941. But the court was not somehow suggesting that Section 1605(a)(3) precludes jurisdiction over a nonexpropriating foreign state. That issue simply was not before the court of appeals in *Chabad* and the court therefore did not address it.

2. Petitioners do not assert that the court of appeals' exhaustion ruling is in conflict with any decision of this Court or of any other court of appeals. Nor does this case even present a suitable occasion for addressing whether a plaintiff must exhaust any available foreign remedies before bringing suit under Section 1605(a)(3). As a threshold matter, petitioners do not make clear whether they believe that Section 1605(a)(3) requires exhaustion in the foreign state that committed the taking in violation of internation law (here, Germany), the state whose instrumentality owns or operates the expropriated property (Spain), or both. Petitioners appear to argue that exhaustion is required only in "the State where the violation has occurred." Pet. 31 (quoting *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996)); see Pet. 29-32 & n.12.

Even assuming, *arguendo*, that this argument is correct, there is no evidence in this record indicating that any remedies have been in the past or are currently available in Germany to compensate for an unlawful tak-

ing of property by the Nazi regime.[6] That evidentiary point is important because, even on petitioners' approach, exhaustion is required only if foreign remedies have been available to a plaintiff at some point in time. See Pet. 30 (arguing that there is no taking in violation of international law "until the claimant has exhausted *available* remedies") (emphasis added). Accordingly, it is not clear whether a mandatory exhaustion requirement would matter on the facts of this case.

Moreover, although the court of appeals held that "the expropriation exception does not *mandate* exhaustion," it left open the possibility that "exhaustion *may* apply to the claims asserted in this case." Pet. App. 36a. The court did not reach that question, because "[u]nlike statutory exhaustion, * * * '[j]udicially-imposed or prudential exhaustion is not a prerequisite to the exercise of jurisdiction.'" *Ibid.* (quoting *Sarei* v. *Rio Tinto, PLC*, 550 F.3d 822, 828 (9th Cir. 2008)) (en banc) (first set of brackets added). The court of appeals' decision thus leaves petitioners free to argue on remand, and the district court free to decide, that respondent should be required to exhaust foreign remedies as a prudential matter before the district court will entertain his claims. Because the record is undeveloped on whether foreign remedies are even available, the better course is for the parties to litigate that question and the need for prudential exhaustion before the district court.

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[6] Petitioners note that "Germany, following World War II, implemented an extensive process to compensate the victims of Nazi persecution." Pet. 29 n.12. Petitioners do not, however, identify any specific remedy that was or is available in Germany to compensate respondent for the value of an artwork taken by the Nazi government in violation of international law.

3. Finally, the issues presented in this case do not seem to arise frequently. With respect to the immunity ruling, the government is aware of no circuit court decision and only three district court decisions addressing that question, and all agree with the decision below that Section 1605(a)(3) permits jurisdiction over a nonexpropriating foreign state or instrumentality. See Br. in Opp. 10-11 (collecting decisions). With respect to the exhaustion ruling, the government has identified only one circuit court decision addressing that question. In *Chabad*, the district court held that Section 1605(a)(3) does not require, as a precondition to the exercise of jurisdiction, that a plaintiff exhaust available remedies in the foreign state that is alleged to have engaged in a discriminatory and unlawful taking of property, 466 F. Supp. 2d at 20-21, and the court of appeals concluded that holding was "likely correct," 528 F.3d at 948-949. Given the lack of decisional authority and the uniformity of what authority exists, there is no need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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